Supreme Court, U.S.
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No. 03 699 NOV - 6 2003

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD S. ALAMEIDA, JR., Director of the California Department of Corrections, *Petitioner*,

v.

JAMES EDWARD SMITH, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In 1981, this Court held in *Rose v. Lundy* that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims," known as "mixed petitions." *Rose v. Lundy*, 455 U.S. 509, 516, 522 (1981). In 1996, Congress enacted a one-year period of limitation to file habeas petitions. 28 U.S.C. § 2244(d).

Is dismissing a mixed petition under *Rose v. Lundy* improper unless the district court first offers to stay the federal proceedings pending exhaustion of state remedies and advises that the period of limitation would bar a future petition?

2. In *Duncan v. Walker*, this Court held that a prior mixed habeas petition does not *statutorily* toll the one-year period of limitation, but noted that it "had no occasion to address . . . the availability of *equitable* tolling." *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (emphasis added).

May the period of limitation be equitably tolled if a district court dismissed a prior mixed habeas petition after the period expired without advising the habeas petitioner of the option to delete an unexhausted claim as an alternative to dismissal, without offering to stay the petition pending exhaustion, and without advising that the period would bar a future petition?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

EDWARD S. ALAMEIDA, JR., Director of the California Department of Corrections, *Petitioner*,

v.

JAMES EDWARD SMITH, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Edward S. Alameida, Jr., Director of the California Department of Corrections,[1/] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

The instant petition presents questions that are currently pending before this Court in *Pliler v. Ford*, No. 03-221 (petition filed Aug. 8, 2003) (Question 1), *Adams v. Brambles*, No. 03-357 (petition filed Sept. 2, 2003) (Questions 1 & 2), and *Pliler v. Hunt*, No. 03-520 (petition filed Oct. 6, 2003). The text of

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1. In the proceedings below, J.M. Ratelle, the former warden of Richard J. Donovan Correctional Facility, was listed as respondent Smith's custodian. In addition, B. Kathleen Blanchard, a former California Deputy Attorney General was improperly named as Smith's custodian. Smith is currently on parole, and his custodian is now Edward S. Alameida, Jr., Director of the California Department of Corrections (hereafter referred to as the State).

the current petition mirrors that of the petitions in *Pliler v. Ford*, *Adams v. Brambles*, and *Pliler v. Hunt*, with necessary modifications as appropriate to reflect circumstances unique to this case.

In the event the Court grants one or more of the petitions for writ of certiorari in *Pliler v. Ford*, *Adams v. Brambles*, and/or *Pliler v. Hunt*, the State suggests that this petition should be held pending the final disposition of those cases, and should then be disposed of as appropriate.

OPINION OR JUDGMENT BELOW

The opinion of the Ninth Circuit is reported as *Smith v. Ratelle*, 323 F.3d 813 (9th Cir. 2003), and is reproduced in section A of the Appendix to this Petition. The Ninth Circuit's order denying the State's petition for rehearing and suggestion for rehearing en banc is unreported and is reproduced in section B of the Appendix. The relevant orders of the district courts in this case and the prior cases are unreported and are reproduced in sections C through O of the Appendix to this Petition.

STATEMENT OF JURISDICTION

On March 26, 2003, the Ninth Circuit entered its judgment reversing and remanding with instructions. App. A. On August 8, 2003, the Ninth Circuit denied the State's petition for rehearing with suggestion for rehearing en banc. App. B. The State timely invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2244 of Title 28 of the United States Code provides in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

> judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State . . . .

STATEMENT OF THE CASE

In 1992, a Los Angeles County jury convicted Smith of one count of first degree burglary. Smith admitted various prior conviction allegations and was sentenced to twenty-two years in state prison. On July 27, 1994, the California Court of Appeal affirmed the conviction, and on November 3, 1994, the California Supreme Court denied review.

On March 7, 1996, in case number CV-96-1641-R, Smith filed his first habeas corpus petition in the United States District Court for the Central District of California. On June 11, 1996, the district court entered a judgment dismissing the petition without prejudice, because Smith had not exhausted his state court remedies with respect to five of the seven claims raised in the petition. App. M, N, O. The district court advised Smith of his two options following dismissal:

> (1) resubmitting his habeas petition with only his exhausted claims **(which would risk forfeiture of his unexhausted claims under Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts);** or (2) exhausting his state remedies with respect to the unexhausted claims and then filing a new petition that contains all of the claims raised in the present petition.

App. O (emphasis in original).

On July 10, 1996, Smith filed a habeas corpus petition in the California Supreme Court. The petition was denied on September 25, 1996.

On February 4, 1997, in case number CV-97-0731-CBM, Smith filed his second habeas corpus petition in the United

States District Court for the Central District of California. On February 10, 1997, the district court dismissed the petition with leave to amend, because it did not contain Smith's original signature. App. L. On March 10, Smith filed a first amended petition. On March 14, the district court dismissed the first amended petition with leave to amend because it was unclear which claims Smith intended to assert. App. K. On April 11, Smith filed a second amended petition. On June 16, the district court ordered Petitioner to file a supplement to the second amended petition, as it was still not clear which claims Smith was asserting. App. J. On June 26, Smith filed a supplement. On November 3, 1997, the district court dismissed the petition without prejudice for failure to exhaust his state court remedies with respect to one of the seven issues raised in the petition. App. G, H, I. Smith was advised that following dismissal, he had two options:

> (1) submitting to this court a new habeas petition that does not contain any unexhausted claims (which would risk forfeiture of these claims under Rule 9(b) of the Rules Governing § 2254 Cases in the United States District Courts) or (2) exhausting his state remedies and then submitting to this court a petition which contains all of the claims raised in the present proceeding.

App. I-63 (emphasis in original).[2/]

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2. When the district court dismissed the petition, it was unclear whether federal petitions tolled the statute of limitations under 28 U.S.C. § 2244(d)(2). This Court subsequently held in *Duncan v. Walker*, 533 U.S. 167, 178-79 (2001), that federal petitions do not toll the statute of limitations. Thus, with the benefit of hindsight, it is now apparent that the statute of limitations had expired at the time the petition was dismissed.

On January 5, 1998, Smith mailed a habeas petition to the California Supreme Court. On April 29, 1998, the court denied the petition.

On July 17, 1998, Smith filed the instant Petition. On March 9, 1999, the district court entered judgment denying the Petition with prejudice as untimely. App. C, D, E, F.

In a published opinion, the Ninth Circuit reversed, holding that the district court erred in dismissing the second federal petition without giving Smith an informed opportunity to withdraw his one unexhausted claim as an alternative to dismissal, and because this dismissal likewise prevented Smith from obtaining the benefit of the "withdrawal and abeyance procedure," Smith was entitled to equitable tolling to render the instant Petition timely. The Ninth Circuit found that the district court did not give Smith an accurate description of his options, because the period of limitations had already expired when the petition was dismissed, barring any future federal review of his claims. App. A-7-9.

In a dissent, Judge Beezer wrote that, although the district court improperly dismissed the second federal petition without offering Smith an opportunity to amend the petition, this error did not cause Smith to file the instant petition after the statute of limitations had expired. Rather, it was Smith's "own doing that caused the late filing." App. A-12.

REASONS FOR ISSUING THE WRIT

I.

The Ninth Circuit has decided an important and recurring issue regarding the dismissal of mixed habeas petitions under *Rose v. Lundy* in a way that conflicts with decisions of this Court, institutionalizes a "stay-and-abeyance" procedure of unlikely merit, places a significant burden on the district courts, and also conflicts with decisions of other circuit courts of appeals.[3]

Relying in part on the Ninth Circuit precedent of *Ford v. Hubbard*,[4] the majority in this case concludes that Smith's second federal habeas petition was improperly dismissed, in part because the district court's dismissal prevented Smith from obtaining the benefit of the "withdrawal and abeyance procedure." App A-8-9. The majority explains, "Had the district court applied the withdrawal-and abeyance procedure, it could have considered each of Smith's seven claims on their merits after complete exhaustion. But because the court failed to consider this procedure, Smith did not have an informed opportunity to withdraw his unexhausted claim and request abeyance." App. A-10. The majority's holding in that regard ignores over twenty years of Supreme Court precedent, which unwaveringly requires "a district court [to] *dismiss* habeas

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3. Petitions presenting the same question are pending before the Court in *Pliler v. Ford*, No. 03-221 (petition filed Aug. 8, 2003) (Question 1), *Adams v. Brambles*, No. 03-357 (petition filed Sept. 2, 2003) (Question 1), and *Pliler v. Hunt*, No. 03-520 (petition filed Oct. 6, 2003). The text of this petition is similar to that contained in the above pending petitions.

4. *Ford v. Hubbard*, 305 F.3d 875, (9th Cir. 2001), amended by 330 F.3d 1086 (9th Cir. 2002).

petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. at 522 (emphasis added).

The majority also cites *Ford* for the proposition that district courts are compelled to provide warnings about the one-year limitation period of the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter the AEDPA) before dismissing a mixed petition. App. A-9; *see* 28 U.S.C. §2244. Since *Ford*, district courts have been required to advise a habeas petitioner "that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opt[s] to dismiss the petition[] 'without prejudice' and return to state court to exhaust all of his claims." *Ford v. Hubbard*, 330 F.3d at 1093. By adopting *Ford's* reasoning in that regard, the majority's decision runs afoul of Supreme Court precedent. This Court has never required such warnings or advisements; nor has it ever held that their absence renders the dismissal of a mixed petition erroneous. *See Duncan v. Walker*, 533 U.S. 167, 178-79 (2001); *Rose v. Lundy*, 455 U.S. at 522.

At least three other circuit courts of appeals have rejected the panel's approach in this case. Thus, the decision conflicts with *Rose v. Lundy*, institutionalizes a "stay and abeyance" procedure of dubious merit, imposes new and onerous burdens on district courts in connection with the dismissal of mixed habeas petitions, and clashes with the holdings of other federal appellate courts.

1. In a long line of cases commencing with *Rose v. Lundy*, this Court has repeatedly held that "because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, . . . a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. at 522; *id.* at 518-19 ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error"); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held

that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims"); *Castille v. Peoples*, 489 U.S. 346, 349 (1989) ("Respondent's habeas petition should have been dismissed if state remedies had not been exhausted as to any of the federal claims"); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring) ("In *Rose v. Lundy*, . . . the Court announced that a habeas petition containing exhausted and unexhausted claims must be dismissed"); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982) ("If [an unexhausted] claim were present, *Rose v. Lundy*, . . . would mandate dismissal of the entire petition").

The same principles apply to cases subject to the AEDPA. In *Duncan v. Walker*, 533 U.S. at 167, this Court concluded that "[t]he exhaustion requirement [set forth in the AEDPA] ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Id.* at 178-79. The *Duncan* majority also noted that "[t]olling the limitation period for a federal habeas petition that is dismissed without prejudice would . . . create more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves. We do not believe that Congress designed the statute in this manner." *Id.* at 180.

2. The panel's decision conflicts with Supreme Court precedent, by institutionalizing a "stay and abeyance" procedure whereby a mixed petition may be filed, unexhausted claims dismissed, and a stay of proceedings obtained for the purpose of exhausting the dismissed claims in state court. Once the dismissed claims are exhausted, they may be added to the pending federal petition by way of amendment, and are deemed to "relate back" to that petition for purposes of the AEDPA 's limitation period (even where such claims were time-barred *prior* to their filing in state court). Thus, despite this Court's insistence that only the timely filing of a claim in *state* court

may toll the AEDPA's limitation period, *see Duncan v. Walker*, 533 U.S. at 179-80, the panel in this case holds that the timely filing of a habeas petition in *federal* court may toll the limitation period for unexhausted and otherwise time-barred claims, through amendment and relation back. If allowed to stand, the panel's holding would eviscerate the AEDPA's limitation period, and reduce district courts to "a jurisdictional parking lot." *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995). As this Court stated in *Rose v. Lundy*, "strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition." 455 U.S. at 520. The panel's holding will encourage the very opposite.

Indeed, federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992); *In re Blodgett*, 502 U.S. 236, 239-40 (1992) (*per curiam*). Considerations of comity compel the timely consideration of matters in federal habeas cases, because of their importance to the State, as well as the prospect of undue delay in the execution of judgment. *See In re Blodgett*, 502 U.S. at 239 ("The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decision[] in Rose v. Lundy"); *but cf. Duncan v. Walker*, 533 U.S. at 182 (Souter, J., concurring) ("[N]othing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies"); *see also id.* at 182-83 (Stevens, J., concurring) ("[I]n our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies").

3. The panel's holding in that regard also conflicts with the decisions of at least two other circuit courts of appeals. In *Victor v. Hopkins*, 90 F.3d 276 (8th Cir. 1996), the Eighth Circuit held that district courts lack authority to hold mixed petitions in abeyance, even in capital cases. As the court stated:

> We conclude that any suggestion in our prior cases that a district court has broad discretion to hold in abeyance a habeas petition including both exhausted and unexhausted claims pending exhaustion of state remedies is contrary to the Supreme Court's explicit directions in *Rose v. Lundy*. . . . The correct view is represented by our line of cases . . . in which we have given recognition to the clear teaching of *Rose v. Lundy* regarding the treatment of mixed petitions. Accordingly, we hold that the District Court has no authority to hold Victor's mixed petition in abeyance or to maintain the stay of execution. The choices stated in *Rose v. Lundy* are the only options available to a habeas petitioner.

Id. at 282; *see also Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003) (following *Victor*, rejecting the Ninth Circuit's "stay and abeyance" procedure, and concluding that, "[a]bsent contrary controlling Supreme Court authority, we are bound to follow our own precedents and the Supreme Court's view as expressed in *Rose v. Lundy*"); *Jackson v. Dormire*, 180 F.3d 919, 920 (8th Cir. 1999) (following *Victor*); *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (same).

In *Sterling v. Scott*, 57 F.3d at 451, the Fifth Circuit upheld the district court's dismissal of a mixed habeas petition in a capital case:

> As referred to earlier, 28 U.S.C. § 2254(b) provides

> that an application for a writ of habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." . . . The district court must also dismiss a mixed petition, such as Sterling's petition, containing both exhausted and unexhausted claims. . . . Accordingly, the district court was correct in dismissing Sterling's amended federal petition for failing to exhaust his state remedies as required in § 2254, and the district court did not err in refusing to hold in abeyance a petition over which it simply and plainly had no jurisdiction. . . .

Id. at 454; *see also Alexander v. Johnson*, 163 F.3d 906, 908 (5th Cir. 1998) ("A habeas petition containing both exhausted and unexhausted claims is a 'mixed' petition which should be dismissed without prejudice"); *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) ("A federal habeas petition should be dismissed if state remedies have not been exhausted as to all of the federal court claims"); *McGrew v. Texas Bd. Of Pardons & Paroles*, 47 F.3d 158, 161 (5th Cir. 1995) ("McGrew's allegations reflect that he has not exhausted his state remedies and, therefore, insofar as his complaint can be construed as seeking habeas relief, it must be dismissed for failure to exhaust"); *cf. Thompson v. Sec'y for Dep't of Corr.*, 320 F.3d 1228, 1229-30 & n.3 (11th Cir. 2003) (district court did not abuse its discretion by dismissing mixed habeas petition where petitioner failed to respond to district court's inquiry regarding the dismissal of unexhausted claims, despite petitioner's claim that he was compelled to file a mixed petition in order to meet the AEDPA's one-year filing deadline and preserve federal review of the exhausted claims).

4. Moreover, no court (other than the Ninth Circuit) has ever held that a district court must advise a habeas petitioner that his federal claims may be time-barred, absent any equitable tolling, if he chooses to dismiss a mixed petition and return to

state court to exhaust his newly-presented claims. As the dissent in *Ford* cogently observed, "the district judge will almost never be able to tell, solely from the face of the petition, that the statute of limitations has expired." *Ford v. Hubbard*, 330 F.3d at 1108.

5. The panel's requirement that petitioners be advised of the AEDPA's limitation period is also inconsistent with the Second Circuit's holding in *Warren v. Garvin*, 219 F.3d 111 (2d Cir. 2000). There, the appellant argued that his second habeas petition should be treated as a motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and regarded as a continuation of his first petition; the appellant maintained that such relief was warranted because he was not warned in the first proceeding that the AEDPA's limitation period would preclude him from refiling. *Id.* at 114. In rejecting that argument, the Second Circuit held:

> Warren contends that he is entitled to relief "because [he] was never informed of the effect of a dismissal on his ability to bring a subsequent petition." However, appellant knew of the 1-year limitations period for habeas petitions under the AEDPA, and his failure to timely refile (or to pursue his additional state claims) is merely garden variety neglect. Because "excusable neglect" is a ground for relief under Rule 60(b)(1), it cannot be considered under Rule 60(b)(6). Therefore, Warren's petition, even if treated as a motion under Rule 60(b), must be denied.

Id. at 114-15; *see also Zarvela v. Artuz*, 254 F.3d 374, 378, 380 (2d Cir. 2001) (citing *Warren*).

Resolution of the conflict between the Ninth Circuit and the Second, Fifth, and Eighth Circuits is vital to the proper and consistent application of this Court's precedent.

II.

The Ninth Circuit has acted inconsistently with this Court's precedent on equitable tolling, total exhaustion, and the period of limitation, by holding that the period should be equitably tolled if a prior district court did not expressly advise a habeas petitioner of his option to delete an unexhausted claim as an alternative to dismissal and did not employ a stay-and-abey procedure before dismissing a mixed federal habeas corpus petition.[5]

Certiorari should be granted, also, because the Ninth Circuit's holding on equitable tolling runs afoul of this Court's precedent. Given the limitation period's detailed statutory provisions for enlarging and tolling the period of limitation, this Court's case law compels the conclusion that Congress did not contemplate equitable tolling for AEDPA. Moreover, granting equitable tolling because a prior district court did not advise a habeas petitioner of the option to amend a petition as an alternative to dismissal and because the district court did not follow a stay-and-abey procedure disregards this Court's unequivocal directive that a habeas petitioner must go to state court *before* going to federal court.

1. At the outset, there is an important question of whether equitable tolling of the AEDPA's period of limitation ever should be allowed. In *Duncan v. Walker*, this Court held that a prior federal habeas corpus petition did not *statutorily* toll the period of limitation. *Duncan v. Walker*, 533 U.S. at 181-82. In doing so, this Court acknowledged the question of whether

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5. The question of whether the AEDPA's period of limitations should be equitably tolled if a prior district court did not employ a stay-and-abey procedure before dismissing a mixed federal habeas corpus petition is currently pending before the Court in *Adams v. Brambles*, No. 03-357 (petition filed Sept. 2, 2003) (Question 2).

a prior federal habeas corpus petition can *equitably* toll the limitation period. *Duncan v. Walker*, 533 U.S. at 181. Nonetheless, a majority of this Court declined to decide the question in *Duncan*, noting that the prior district court dismissed the petition before the limitation period expired. *Id.* at 181-82. In two separate concurring opinions, Justices Souter and Stevens granted that *Rose v. Lundy* required dismissal of mixed petitions but indicated that, after the advent of AEDPA, equitable tolling could potentially apply if a prior federal court dismissed a mixed petition after the limitation period expired instead of staying and abeying it. *Id.* at 182 (Souter, J., concurring); *id.* at 182-83 (Stevens, J., concurring). This case presents the question left open in *Duncan* because the Ninth Circuit awarded equitable tolling due to the prior federal court dismissing the mixed petition after the limitation period expired.

2. The Ninth Circuit's conclusion that equitable tolling is available under AEDPA is inconsistent with this Court's rationale in other cases. In *United States v. Beggerly*, 524 U.S. 38 (1998), this Court held there was no equitable tolling available as to the Quiet Title Act, 28 U.S.C. § 2409a, because Congress had already accounted for equitable tolling by "providing that the statute of limitations will not begin to run until the plaintiff 'knew or should have known of the claim of the United States,'" and, that under these circumstances, "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *Beggerly*, 524 U.S. at 48.

Similarly, this Court in *Lampf v. Gilbertson*, 501 U.S. 350 (1991), held that Congress did not intend the statute of limitations of 15 U.S.C. § 78j(b), pertaining to the Securities and Exchange Commission, to be equitably tolled. *Lampf*, 501 U.S. at 363. This Court reasoned, in part, that "[t]he 1-year period, by its terms, begins after discovery of the facts constituting the violation, mak[ing] tolling unnecessary." *Id.*; *see also United States v. Brockamp*, 519 U.S. 347, 351-52 (1997); *Lonchar v. Thomas*, 517 U.S. 314, 323, 332 (1996).

Like the statutes at issue in *Beggerly* and *Lampf*, the

AEDPA already contains a provision contemplating this specific equitable situation, 28 U.S.C. § 2244(d)(1)(D), "which postpones the running of the one-year limitation for the filing of a petition for habeas corpus to 'the [earliest] date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.'" *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999). Furthermore, Congress detailed two other equitable conditions for enlarging the period and also specified prerequisites for statutory tolling. 28 U.S.C. § 2244(d)(1)(B), (C), (2). As the First Circuit has recently explained in doubting the existence of equitable tolling in the AEDPA:

> [S]ection 2244(d) comprises six paragraphs defining its one-year limitations period in detail and adopting very specific exceptions. Congress likely did not conceive that the courts would add new exceptions and it is even more doubtful that it would have approved of such an effort. [Citation.] AEDPA reflects Congress' view that the courts were being too generous with habeas relief and that the whole system needed to be tightened up.

David v. Hall, 318 F.3d 343, 346 (1st Cir. 2003); *see also Taliani*, 189 F.3d at 598 ("[g]iven this and other express tolling provisions (28 U.S.C. §§ 2244(d)(1)(B), (C), (2)), it is unclear what room remains for importing the judge-made doctrine of equitable tolling"). Accordingly, extension of the one-year period set forth in the AEDPA by equitable tolling is "unwarranted," *see Beggerly*, 524 U.S. at 49, and "unnecessary," *see Lampf*, 501 U.S. at 363.

3. Even assuming equitable tolling is available under the AEDPA, the Ninth Circuit's holding that it is justified based on an earlier, mixed petition dismissed after the period expires, contradicts the reasoning in *Duncan v. Walker*, 533 U.S. 167, and functionally eviscerates *Duncan*'s holding for the greater

amount of timeliness cases dealing with prior federal petitions. Just as with statutory tolling, permitting equitable tolling for dismissed prior, mixed habeas corpus petitions:

> would furnish little incentive for individuals to seek relief from the state courts before filing federal habeas petitions. . . . [It would also] further undermine the interest in finality by creating more potential for delay in the adjudication of federal law claims.

Id. at 180.

Furthermore, this Court in *Duncan* "observed that 'strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition.'" *Duncan*, 533 U.S. at 180 (quoting *Rose v. Lundy*, 455 U.S. at 520). Requiring equitable tolling because a prior district court did not utilize a stay-and-abey procedure before dismissing a mixed petition:

> would dilute the efficacy of the exhaustion requirement in achieving this objective. Tolling the limitation period for a federal habeas petition that is dismissed without prejudice would thus create more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves.

Id. The Ninth Circuit's award of equitable tolling therefore "fails to account sufficiently for AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Duncan,* 533 U.S. at 181.

The AEDPA's exhaustion and timeliness provisions are synchronized to "encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon

as possible." *Duncan*, 533 U.S. at 181. The Ninth Circuit's equitable-tolling holding, on the other hand, flies in the face of this Court's interpretation of the exhaustion requirement and the period of limitation, by encouraging litigants *first* to file their federal habeas petitions and *then* to exhaust all state remedies. *See Biggs v. Duncan*, 339 F.3d 1045, 1048 n.2 (9th Cir. 2003).

4. Equitable tolling would not apply here even under the equitable tolling test laid down by the Ninth Circuit, a test similar to that of other circuits that have articulated one for the period of limitation.[6] Under this test, equitable tolling of the limitation period is only present if "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999); *see Smaldone v. Sendowski*, 273 F.3d 133, 138 (2d Cir. 2001)

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6. Some circuits have decided that the AEDPA's period of limitation can be equitably tolled. *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Harris v. Hutchinson*, 209 F.3d 325, 328-30 (4th Cir. 2000); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Sandvik v. United States*, 177 F.3d 1269, 2171-72 (11th Cir. 1999); *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998); *Miller v. New Jersey Department of Corrections*, 145 F.3d 616, 617-18 (3d Cir. 1998); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1289 (9th Cir. 1997). Other circuits have avoided deciding equitable tolling's existence in AEDPA by denying equitable tolling claims on their merits. *Lattimore v. Dubois*, 311 F.3d 46, 55 (1st Cir. 2002); *United States v. Saro*, 252 F.3d 449, 453-54 (D.C. Cir. 2000). The Seventh Circuit has sometimes found its availability unclear, *Johnson v. McCaughtrey*, 265 F.3d 559, 565-66 (7th Cir. 2001); *Owens v. Boyd*, 235 F.3d 356, 360 (7th Cir. 2000), and other times assumed its availability without much explanation, *Wilson v. Battles*, 302 F.3d 745, 748 (7th Cir. 2002); *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000).

(equitable tolling available if the petitioner faced an extraordinary circumstance beyond his control that prevented him from timely filing the petition); *York v. Galetka*, 263 F.3d 1135, 1142-43 (10th Cir. 2001) (equitable tolling available if the petitioner diligently pursues his claims and shows that his failure to file on time was the result of extraordinary circumstances beyond his control); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (equitable tolling available if there either was governmental interference with the prisoner's attempt to file or any other circumstance beyond the prisoner's control that caused his untimely filing).

The first habeas petition that Smith filed in federal court was mixed. It was by no means an extraordinary circumstance for the prior district court to follow this Court's procedure in *Rose v. Lundy* mandating dismissal of mixed petitions. Likewise, it was not an extraordinary circumstance for the prior district court to dismiss Smith's second federal habeas petition in accordance with *Rose v. Lundy*, especially when the Ninth Circuit had not yet required express advisements regarding the option of deleting an unexhausted claim as an alternative to dismissal and likewise had not yet required the stay-and-abey procedure. Furthermore, nothing happened beyond Smith's control. There is no allegation he did not have adequate resources or the ability to file a timely, exhausted petition in the first place and nothing the prior district courts did prevented Smith from doing so. In addition, the prior district courts' procedures did not make it impossible for Smith to file a timely petition. If the prior district courts erred in some way, it was incumbent upon Smith to appeal *those* judgments. His failure to do so, along with the 421 days of delay for which Smith was directly responsible between the starting of the period of limitations and Smith's filing of the instant petition,[7/]

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7. Judge Beezer noted in his dissent that Smith was "directly responsible" for at least 421 days of delay, which was itemized as follows: (1) the 71 days that elapsed from the time

demonstrated a lack of diligence inconsistent with equitable tolling. *See* App. A-21; *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984); *Guillory v. Roe*, 329 F.3d 1015, 1018 & n.1 (9th Cir. 2003).

Resolving equitable tolling is often time-consuming and fact-intensive. Cases that should be summarily dismissed as barred by the limitation period may nevertheless require substantial analysis and even evidentiary hearings to determine if the period should be equitably tolled. *See, e.g., Griffin v. Rogers*, 308 F.3d 647, 654 (6th Cir. 2002); *Lott v. Mueller*, 304 F.3d 918, 925 (9th Cir. 2002); *Hall v. Scott*, 292 F.3d 1264, 1268 (10th Cir. 2002); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001); *Woodward v. Williams*, 263 F.3d 1135, 1143 (10th Cir. 2001); *Whalem/Hunt v. Early*, 233 F.3d 1146, 1147 (9th Cir. 2000); *Valverde v. Stinson*, 224 F.3d 129, 135 (2d Cir. 2000); *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000); *Miller v. New Jersey Dept. of Corrections*, 145 F.3d 616, 617 (3d Cir. 1998) (all remanding for the district courts to further consider whether the petitioners should be granted equitable tolling). Yet despite equitable tolling's transforming effect on the AEDPA's limitation period, this Court has not had the opportunity to provide specific guidance on whether equitable tolling even exists under AEDPA, and, if it does, whether it is justified when a prior district court dismissed a mixed petition

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the first federal habeas petition was dismissed and the filing of Smith's first California Supreme Court petition; (2) the 101 days that elapsed between the finality of the California Supreme Court's denial of Smith's first state petition and the filing of his second federal habeas petition; (3) the 140 days of delay attributable to Smith during the pendency of the second federal habeas petition, due to his failure to follow court rules and failure to allege his claims with particularity; (4) the 109 days (excluding potentially tolled time) that Smith spent going to and returning from state court following dismissal of the second federal petition. App. A-20.

without advising the habeas petitioner of the option of deleting the unexhausted claim as an alternative to dismissal and without offering to stay and abey the petition pending exhaustion of state remedies. This case presents an opportunity to decide these critical issues.

5. Finally, the application of equitable tolling in this case is inconsistent with the decisions of two other circuit courts of appeals, which have declined to apply equitable tolling where a habeas petitioner did not promptly travel to and from state court in exhausting state court remedies following the dismissal of a federal habeas petition. In *Palmer v. Carlton*, 276 F.3d 777, 781-82 (6th Cir. 2002), the Sixth Circuit declined to apply equitable tolling in a situation similar to the instant case. Palmer's timely federal habeas petition was dismissed without prejudice on March 2, 1999 (the final day of the AEDPA's period of limitations) to allow Palmer to exhaust his state court remedies. *Palmer*, 276 F. 3d at 780. After exhausting his state court remedies, Palmer re-filed an untimely federal petition on May 24, 1999. *Id.* In declining to apply equitable tolling, the Sixth Circuit explained:

> Although his state-court remedies were exhausted on March 22, 1999, he waited until May 24, 1999, before he returned to federal court and filed a second habeas petition. This wait amounted to more than the "normal" 30-day period suggested by the Second Circuit [in *Zarvela*] as a reasonable period for a petitioner to return to federal jurisdiction, and the record offers no reason for the two-month delay.

Id. at 781-82.

The Eleventh Circuit reached a similar result in *Drew v. Dept. of Corrections*, 297 F.3d 1278, 1290-92 & n.5 (11th Cir. 2002). Drew's first timely-filed federal habeas petition was dismissed with instructions to exhaust his remedies in state court. When Drew eventually finished exhausting his state

court remedies and returned to federal court, his re-filed petition was untimely. The Eleventh Circuit concluded that equitable tolling was not appropriate, because Drew had not acted with diligence:

> In order to be entitled to the benefit of equitable tolling, a petitioner must act with diligence, and the untimeliness of the filing must be the result of circumstances beyond his control. The magistrate judge in this case found as a fact, and the district court agreed, that Drew acted with no such diligence in pursuing his habeas corpus petition, and the determination of whether a party was diligent is a finding of fact, subject to review for clear error.

Drew, 297 F.3d at 1286-87. The Eleventh Circuit further elaborated on how equitable tolling has historically been an extraordinary remedy reserved for those who act with diligence:

> [I]t is equally true that Drew's lack of diligence bars us from reaching out and granting the rare and extraordinary remedy of equitable tolling. In asking the court to equitably toll the statute of limitations, Drew requests a judicially-crafted remedy that has *always* been reserved only for parties who have pursued their rights diligently and whose untimeliness is due to factors entirely beyond their control.

Drew, 297 F.3d at 1290 n.5 (emphasis in original). The Eleventh Circuit further explained that the decision not to apply equitable tolling was based on the defendant's lack of diligence:

> This conclusion is based on the longstanding, firmly rooted principle that a court cannot grant equitable tolling unless it is satisfied that the party seeking such relief has acted with diligence. The diligence

> requirement that we recognize has been imposed for centuries by judges applying principles of *equity* jurisprudence.

Id. (emphasis in original).

Thus, the application of equitable tolling in this case, despite the fact that Smith delayed 109 days (excluding state court tolling time) traveling to and from state court following dismissal of the second federal habeas petition is inconsistent with the decisions of the Sixth and Eleventh Circuits. Resolution of this conflict is vital to the proper and consistent application of this Court's precedent.

CONCLUSION

This Court should grant the petition for writ of certiorari, or in the alternative, hold the case pending final disposition of *Pliler v. Ford*, No. 03-221 (petition filed Aug. 8, 2003), *Adams v. Brambles*, No. 03-357 (petition filed Sept. 2, 2003), and *Pliler v. Hunt*, No. 03-520 (petition filed Oct. 6, 2003), so that this case may be disposed of as appropriate in light of those cases.

Dated: November 6, 2003

Respectfully submitted,

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES EDWARD SMITH, Petitioner-Appellant, **v.** **J.M. RATELLE; B. KATHLEEN BLANCHARD,** Respondents-Appellees.	No. 99-55824 D.C. No. CV-98-05747-R-EE OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted December 8, 2000
Submission Vacated December 18, 2000
Resubmitted March 20, 2003

Filed March 26, 2003

Before: James R. Browning, Harry Pregerson, and
Robert R. Beezer, Circuit Judges.

Opinion by Judge Browning; Dissent by Judge Beezer

COUNSEL

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Bill Lockyer, Attorney General of California, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, and Theresa A. Cochrane, Deputy Attorney General, Los Angeles, California, for the respondent.

OPINION

BROWNING, Circuit Judge:

California state prisoner James E. Smith appeals the dismissal of his habeas corpus petition as barred by the one-year statute of limitations of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). We hold that Smith is entitled to equitable tolling because the district court erroneously dismissed his earlier, timely habeas petition without first giving him an opportunity to file an amended petition as an alternative to dismissal. We therefore reverse and remand.

I.

Smith was convicted of first degree burglary and sentenced to 22 years in prison. His conviction was affirmed on direct appeal, and the California Supreme Court denied review on November 2, 1994.

On March 7, 1996, Smith filed a *pro se* habeas corpus petition in federal district court. The petition contained seven

claims, only two of which had been presented to the state courts on direct appeal. Shortly after AEDPA was signed into law on April 24, 1996, the district court dismissed this first petition for failure to exhaust state remedies. The court told Smith that he could either submit a new petition after judgment that omitted the unexhausted claim, or exhaust his state remedies and file a new, fully-exhausted petition in federal court. Smith returned to state court to exhaust the claims that the district court had found unexhausted.

Smith returned to federal court on February 4, 1997, by filing a photocopy of his original handwritten habeas petition. The district court properly gave Smith several opportunities to amend his petitions for clarity and to supplement his claims, but denied his request for appointed counsel. The state filed a motion to dismiss, arguing again that Smith had failed to exhaust certain claims. Smith opposed this motion.

On November 3, 1997, the district court adopted the magistrate's report and recommendation and dismissed Smith's second petition without prejudice because a claim of juror misconduct remained unexhausted.[1/] The court again told Smith

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1. Contrary to the dissent's assertion that Smith *chose* to press a mixed second petition with awareness of the consequences, Smith had attempted to exhaust the juror misconduct claim through the following passage in his state habeas petition:

> Ground Four: — Challenge the jurors for cause; attorney-client, court procedures. (Not for a "layman". *Myself!*) At the beginning of court's proceeding, one juror misconduct excused her. (Rt.1) Another misconduct, juror #1 talks to "bailiff"sotto voice. No objections, then at the end of trial — in polling the jurors, again juror

that after dismissal he could file a new petition that withdrew the unexhausted claim or return to state court and exhaust that claim. However, AEDPA's one-year limitations period had expired on August 13, 1997, while the state's motion to dismiss was pending,[2/] and the district court did not tell Smith that he could withdraw his unexhausted claim as an alternative to dismissal. The court immediately entered final judgment.

Following the court's suggestion, Smith returned to state court to exhaust his one unexhausted claim.[3/] The California

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> #1 misconduct — by not been in "certituded, or inconsistent with the conviction."

(Sic.) In his opposition to the state's motion to dismiss, Smith explained that he had tried to exhaust his juror misconduct claim through this language and pleaded for the court's understanding. The district court held that Smith had not fairly presented this claim because the language quoted above was indecipherable. In other briefs and affidavits, Smith explained that his difficulty in presenting his case was attributable to his lack of education and illiteracy.

2. Under AEDPA's one-year grace period, Smith had until April 24, 1997 to file a federal habeas petition. *See Ford v. Hubbard*, 305 F.3d 875, 882 (9th Cir. 2002); *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Smith was entitled to statutory tolling from July 5, 1996, the date he mailed his state habeas petition, until October 24, 1996, thirty days after the California Supreme Court denied his petition. *See Allen v. Lewis*, 295 F.3d 1046 (9th Cir. 2002) (en banc); *Huizar v. Carey*, 273 F.3d 1220,1222 (9th Cir. 2001).

3. Smith mailed his final state habeas petition on December 17, 1997. For reasons that are not clear from the record, the state court did not accept that copy for filing. Smith then mailed another copy on January 5, 1998, which was filed

Supreme Court denied his petition on April 29, 1998. Smith filed a third, fully-exhausted federal petition on July 17, 1998, reasserting each of his earlier claims. The state again moved to dismiss, this time on the ground that this final petition was barred by the statute of limitations. The district court held that this petition was untimely and dismissed it with prejudice.

The district court granted a certificate of appealability on the question of whether Smith's petition "related back" to the filing date of his first petition. We granted a motion to expand the COA to include the issue of whether Smith was entitled to equitable tolling,[4] and we requested supplemental briefing on the effect of *Duncan v. Walker*, 533 U.S. 167 (2001). We review the district court's order dismissing the petition *de novo*. *See Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999).

II.

[1] Under 28 U.S.C. § 2254(b)(1), a habeas petitioner may not obtain relief on a "mixed" petition that contains both exhausted and unexhausted claims. In *Rose v. Lundy*, 455 U.S. 509, 520-21 (1982), however, the Supreme Court recognized that a petitioner had several options to avoid a procedural default: first, he could amend the petition to drop the unexhausted claims and then obtain a decision on the merits of his remaining, exhausted claims; second, he could withdraw his petition, return

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on January 7, 1998.

4. The state argues that Smith waived his equitable tolling argument by filing to raise it below. Even if Smith did not raise the issue below, the state did not object to the court's expanding the certificate of appealability. Now that the equitable tolling issue has been fully briefed on appeal, we may not review the merits of the COA expansion ruling. See *Gatlin v. Madding*, 189 F.2d 882, 887 (9th Cir. 1999).

to state court to exhaust his unexhausted claims, and then file a new habeas petition with fully exhausted claims.

[2] The *Lundy* opinion "contemplated that the prisoner could return to federal court after the required exhaustion." *Slack v. McDaniel*, 529 U.S. 473, 486 (2000). However, under AEDPA's new statute of limitations, 28 U.S.C. § 2244(d)(1), a state prisoner generally must file his habeas petition within one year after his state conviction became final. As we explained in *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), this limitations period may effectively bar a petitioner from exercising his options under *Lundy*:

> Prior to the advent of AEDPA, dismissal without prejudice to the filing of a new, exhausted petition caused no detriment to the petitioner, because there was no time limitation on the filing of a federal habeas petition. AEDPA's one-year statute of limitations, however, has rendered outright dismissal perilous to some litigants, because petitioners such as Anthony may find themselves time-barred when they attempt to resubmit their claims to the district court.

Id. at 573. *See also James v. Pliler*, 269 F.3d 1124, 1126 (9th Cir. 2001) ("To dismiss a petition for curable deficiencies may, therefore, preclude a petitioner from obtaining federal habeas review altogether, even where the dismissal was without prejudice.").

A.

[3] The district court was apparently unaware of the hazards posed by AEDPA's statute of limitations. Smith's second petition was timely, but contained one unexhausted claim.

Operating under the pre-AEDPA interpretation of *Lundy*, the district court's order suggested that dismissal was only a minor procedural setback:

> Following dismissal, petitioner will have the option of: (1) submitting to this court a new habeas petition that does not contain any unexhausted claims *(which would risk forfeiture of these claims under Rule 9(b) of the Rules Governing § 2254 Cases in the United States District Courts)*; or (2) exhausting his state remedies and then submitting to this court a petition which contains all of the claims raised in the present proceeding.

(Emphasis in original). Because the limitations period had expired before dismissal, however, it was impossible (absent equitable tolling) for Smith to file another timely petition. The district court's order presented Smith with a Hobson's choice — if he followed either suggested option, he would face an inevitable procedural default.[5/] Not having been advised of this, Smith dutifully returned to state court to exhaust his sole unexhausted claim. When he returned to federal court with a completely-exhausted petition, he belatedly discovered that all of his claims were now time-barred.

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5. Because the limitations period had already expired, a fully-exhausted petition would have been untimely even if Smith had filed it the same day as the dismissal. Consequently, the dismissal barred Smith from amending his petition to withdraw the unexhausted claims. *See Anthony*, 236 F.3d at 572-74 (noting that the petitioner's new petition that withdrew the unexhausted claim was untimely because it was filed shortly after dismissal and outside of the limitations period, but affirming the district court's equitable power to correct its error by accepting the new petition nunc pro tunc).

[4] This unfortunate predicament was entirely avoidable. Because the statute of limitations may prevent a petitioner from submitting a new petition under *Lundy*, we have long held that district courts must allow petitioners to amend their mixed petitions and withdraw their unexhausted claims as an alternative to suffering dismissal. *See Anthony*, 236 F.3d at 572. Moreover, in light of the severe consequences of a dismissal under AEDPA, the complexity of habeas law, and our preference for decisions on the meri ts, we have recognized that district courts must take special care to advise *pro se* habeas petitioners of their right to strike unexhausted claims. *See Ford*, 305 F.3d at 883-84; *James*, 269 F.3d at 1126; *Tillema v. Long*, 253 F.3d 494, 503 (9th Cir. 2001).

[5] The district court erred by summarily dismissing Smith's second habeas petition and entering final judgment without first giving him an informed opportunity to withdraw his one unexhausted claim before dismissal. Although the court told Smith that he could withdraw his unexhausted claim through a new petition *after* dismissal and final judgment, this option was illusory: because the limitations period had already expired, any new petition would have been untimely. Smith unwittingly faced the same dilemma as the petitioner in *James v. Giles*, 221 F.3d 1074 (9th Cir. 2000):

> We have long held that a federal habeas petition has a right to amend a mixed petition to delete unexhausted claims as an alternative to suffering a dismissal. James unquestionably had a right to amend his petition to delete his three unexhausted claims. But he never had an informed opportunity to do so. By dismissing James' petition without leave to amend at the same time that it explained why it was doing so, the district court failed to provide James with

> notice of his petition's deficiencies in time for him to seek leave to amend.

Id. at 1077 (citations omitted). Had Smith been given an accurate explanation of his options — either to withdraw the one unexhausted claim before dismissal or to forfeit any opportunity for federal habeas review — he could have salvaged his six properly-exhausted claims. *See Ford*, 305 F.3d at 885-86 ("the district court, when informing a habeas petitioner of his options with respect to a mixed petition, should alert the petitioner to the one-year limitations period of AEDPA and to the fact that a portion of that period has already elapsed.") (quotations and citation omitted); *Anthony*, 236 F.3d at 574 ("This court has made clear that district courts must provide habeas litigants with the opportunity to amend their mixed petitions by striking unexhausted claims as an *alternative* to suffering dismissal.") (emphasis added). Because the district court did not inform Smith about his opportunity to withdraw his one unexhausted claim as an alternative to dismissal, Smith lost the only opportunity to have his six other claims considered on their merits.

[6] Further, the district court's dismissal prevented Smith from obtaining the benefit of a related procedure, the withdrawal-and-abeyance procedure. We have held that a "district court must consider the alternative of staying the petition after dismissal of unexhausted claims, in order to permit [p]etitioner to exhaust those claims and then add them by amendment to his stayed federal petition." *Kelly v. Small*, 300 F.3d 1159 (9th Cir. 2002), *as amended*, 315 F.3d 1063, 1070 (9th Cir. 2003). *See also Anthony*, 236 F.3d at 575 ("Our precedent unequivocally authorizes district courts to stay fully exhausted federal petitions pending exhaustion of other claims."). This withdrawal-and-abeyance procedure "is essentially a variant on the principle that a district court must allow a petitioner to amend a mixed petition to strike unexhausted claims[.]" *Hasan v. Galaza*, 254

F.3d 1150, 1152 n.2 (9th Cir. 2001). Although this procedure is discretionary, the "exercise of discretion to stay the federal proceeding is particularly appropriate when an outright dismissal will render it unlikely or impossible for the petitioner to return to federal court within the one-year limitation period imposed by [AEDPA]." *Kelly*, 315 F.3d at 1070.[6] Indeed, the Second Circuit has held that in such circumstances a stay may be the only appropriate action, *Zarvela*, 254 F.3d at 382-83, and this Court noted the failure to exercise such discretion "would likely constitute error." *Ford*, 305 F.3d at 884. *See also Kelly*, 315 F.3d at 1070 ("we join the growing consensus in recognizing the clear appropriateness of a stay when valid claims would otherwise be forfeited.") (quotations and citation omitted). Had the district court applied the withdrawal-and abeyance procedure, it could have considered each of Smith's seven claims on their merits after complete exhaustion. But because the court failed to consider this procedure, Smith did not have an informed opportunity to withdraw his unexhausted claim and request abeyance.

B.

[7] Equitable tolling is available only when "extraordinary circumstances beyond a prisoner's control made it impossible to file a petition on time." *Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998) (en banc). However, we have recognized that a district court's erroneous dismissal of a mixed habeas petition is sufficiently extraordinary to justify equitable tolling. *See Ford*, 305 F.3d at 889 n.14 ("The district court's error in failing properly and fully to inform Ford about

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6. If the district court permits the withdrawal-and-abeyance procedure, it may prevent undue delays by conditioning the stay on prompt exhaustion of the remaining claims in state court. *See Zarvela v. Artuz*, 254 F.3d 374, 380-82 (2d Cir. 2001).

his options with respect to the mixed petitions and in misleading him as to the legal effect of a dismissal of his petitions were 'extraordinary circumstances' . . . that would require equitable tolling of AEDPA's statute of limitations."); *Tillema*, 253 F.3d at 504 ("had the district court followed the law, *i.e.*, *Rose v. Lundy*, Tillema would have been permitted to proceed with all but one of his claims; because the district court erred, Tillema lost all opportunity for federal review of all of his claims"); *see also Corjasso v. Ayers*, 278 F.3d 874 (9th Cir. 2002) (holding that the district court's erroneous dismissal of a *pro se* petition justified equitable tolling).

[8] Smith's second federal petition was timely. If the district court had allowed Smith to withdraw his unexhausted claim as an alternative to dismissal, it could have either considered his six exhausted claims on their merits immediately or held his petition in abeyance and considered all seven claims after exhaustion of the one remaining claim. Because the district court instead summarily dismissed this petition and provided a misleading explanation of Smith's options to avoid a procedural default, Smith lost the opportunity for federal habeas review — even for the six claims that had been properly exhausted.[7]

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7. *Fail v. Hubbard*, 315 F.3d 1059 (9th Cir. 2002), is distinguishable, despite the dissent's assertion that it represents a "similar situation." *Fail* decided whether AEDPA's one-year statute of limitations may be "equitable tolled during the period between the date of the filing of an *entirely unexhausted petition* and the date of its dismissal by the district court without prejudice after the statute of limitations has run." *Id.* at 1060. In this case, Smith attempted to exhaust all seven of his claims before filing his second petition, as explained in footnote 1, *infra*, and, at the very least, exhausted six out of seven of his claims pressed in his second petition. Because the *Fail* case concerned a wholly unexhausted petition purportedly made untimely due to the court's delay, it did not weigh all of the

Because Smith is entitled to the benefit of equitable tolling, his third habeas petition is timely.

III.

We REVERSE the district court's dismissal of Smith's third petition as untimely, and REMAND for further consideration on the merits.

BEEZER, Circuit Judge, dissenting:

The district court improperly dismissed petitioner's second federal habeas petition without offering him an opportunity to amend the petition. This error did not cause petitioner to file his third habeas petition after AEDPA's statute of limitations had run. It was petitioner's own doing that caused the late filing.

Petitioner is not entitled to equitable tolling. The opinion of the Ninth Circuit filed today refuses to apply clearly established principles announced by the Supreme Court.

I would affirm the district court.

I

A federal habeas petitioner is required to fully exhaust the claims supporting the federal petition in state court before a

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considerations attending an erroneous dismissal of a mixed petition. The fact of a *mixed* petition requires considering the body of law concerning dismissal of mixed petitions, and reflects the diligence of the petitioner. *Fail* is factually and legally distinct.

federal district court can potentially grant the petition.[1] 28 U.S.C. § 2254(b)(1)(A). Prisoners may fail to present a fully exhausted federal habeas petition on their first attempt, necessitating a return to state court. *See Sandgathe v. Maass*, 314 F.3d 371, 376 (9th Cir. 2002).

Prisoner James Edward Smith ("Smith") made three attempts to file a fully exhausted petition over a two and a half year period. Five of the seven claims in Smith's first federal petition were unexhausted. The district court dismissed this first federal petition and specifically advised Smith which claims he needed to present to the California Supreme Court. Smith exhausted only four of the five unexhausted claims and resubmitted all five previously unexhausted claims in a second federal petition.

The district court dismissed Smith's second federal petition for failure to exhaust one of his claims. Smith returned to state court to exhaust the remaining unexhausted claim. Eleven months after the AEDPA statute of limitations ran, Smith filed a third federal habeas petition.[2] The district court rejected Smith's argument that the filing date of the third federal petition for tolling purposes related back to the date of filing the first or second federal petition. The district court dismissed the third petition as time-barred. Smith appealed the dismissal of his third federal petition, and his appeal is now before us.

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1. A district court has the option of denying a petition containing unexhausted claims on the merits. 28 U.S.C. § 2254(b)(2).

2. The statute of limitations expired on August 13, 1997.

II

Smith argues that he is entitled to equitable tolling because the district court erroneously dismissed his mixed second petition without allowing Smith to strike the unexhausted claim. The opinion of the court agrees and holds that the district court's improper dismissal of Smith's second federal petition caused the untimely filing of his third federal petition. I disagree.

A

AEDPA imposes a one-year statute of limitations on the filing of all habeas corpus petitions. *See* 28 U.S.C. § 2244(d)(1). This rule "serves the well-recognized interest in the finality of state court judgments" and "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan v. Walker*, 533 U.S. 167, 179 (2001). We are required to enforce AEDPA's statute of limitations absent some legitimate reason to do otherwise.

Equitable tolling may be considered under limited circumstances. Equitable tolling is permitted only "if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (citation omitted). Equitable tolling is applied "sparingly," *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990), and requires surmounting a "high hurdle." *Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997) *overruled on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998). Equitable tolling "will not be available in most cases." *Beeler*, 128 F.3d at 1288. Equitable tolling is not even a possibility until a petitioner submits proof that external forces, and not a petitioner's lack of diligence, accounted for the failure

to file a timely petition. *Miles*, 187 F.3d at 1107. The equitable tolling inquiry measures both proximate cause and proportional relief principles. *See Fail v. Hubbard*, 315 F.3d 1059, 1062 (9th Cir. 2002) (holding that petitioner, who continued to press a petition with unexhausted claims that was eventually dismissed, was not entitled to equitable tolling because petitioner caused the untimeliness problem); *Corjasso v. Ayers*, 278 F.3d 874, 879 (9th Cir. 2002) (holding that equitable tolling "is appropriate only during the delay caused by the extraordinary circumstances" and applying proportional relief principles).

Smith seeks equitable tolling to sustain a determination that his third federal petition was timely filed. He has not shown that extraordinary circumstances beyond his control caused him to file the third petition late. The opinion of the court, in holding otherwise, fails to adhere to the causation and proportional relief principles required in equitable tolling cases.

B

No external forces caused Smith to make three attempts before filing a fully exhausted federal habeas petition. Smith bears sole responsibility for submitting the second of his mixed petitions.

When Smith's first petition was dismissed, the district court advised Smith which claims needed to be exhausted. Despite the aid of explicit instructions, Smith submitted only four of the five unexhausted claims to the California Supreme Court. By presenting a second federal petition containing a previously dismissed, yet still unexhausted, claim, Smith *chose* to press a mixed petition with awareness of the possible consequences. Smith's *pro se* status is no excuse for failing to present a fully exhausted federal habeas petition in these circumstances.

We faced a similar situation in *Fail v. Hubbard* and held that equitable tolling did not apply. 315 F.3d at 1062. In *Fail*, the petitioner was given leave to amend after the district court dismissed the petition because the petition contained unexhausted claims. *Id.* at 1060. The petitioner then deleted some of the unexhausted claims, but not all of them. *Id.* at 1061. Following this amendment, the district court dismissed the petition, doing so after AEDPA's statute of limitations expired. *Id.* We refused to grant equitable tolling in *Fail*, because "[b]y continuing to press his petition of entirely unexhausted claims after the district court informed him that he could only bring claims first brought in state court, Fail was the cause of the delay that ultimately made his petition untimely." *Id.* at 1062. Similar reasoning applies to Smith's actions in pressing his second mixed petition after the district court informed Smith what he needed to do to fix the deficiencies in his first petition.

C

Smith's conduct is the ultimate reason his claims are timebarred. There would have been no exhaustion issue in the second petition — and no "erroneous" dismissal — if Smith had simply followed the district court's instructions following dismissal of the first petition. The court's opinion speculates that Smith would have preserved his claims if the district court had done things differently. The court's opinion suggests a number of things that the district court should have done. These proposals fail to alter the equitable balance in this case.

The court's opinion first focuses on the district court's failure to tell Smith that he could amend his second petition rather than face dismissal after the court found the second petition contained unexhausted claims. Assuming the district court had told Smith that he could amend his second petition, there is no reason to believe that Smith would have taken advantage of this opportunity.

In dismissing the first petition, the district court informed Smith that he could either immediately refile his complaint without the unexhausted claims or he could take the unexhausted claims to state court and file another petition afterward. Smith chose to go back to state court.

Smith also went back to state court when the district court gave him the same choice between resubmission or further exhaustion after dismissing the second petition.[3] It should be noted that Smith knew how to amend his petition; the petition the district court dismissed was Smith's "Second *Amended* Petition." In the face of this history, it is pure speculation to believe that Smith would have opted to amend his petition to delete the unexhausted claim even if the district court had given him yet another opportunity to amend before dismissing the petition.

The opinion of the court then suggests that the real problem in this case was the district court's failure to inform Smith that any future federal habeas petition would or could be timebarred at the time Smith's second petition was dismissed. It is difficult to discern how the district court could have been expected to realize that there was a statute of limitations problem. At the time Smith's second petition was dismissed in 1997, it was still an open question in this circuit whether the time during which a habeas petition was pending in federal court was statutorily tolled.

The Supreme Court did not resolve the circuit split on this issue until June 18, 2001. *See Duncan v. Walker*, 533 U.S.

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3. If Smith had opted to immediately resubmit another petition with the unexhausted claim deleted we would be facing a very different situation. *See Anthony v. Cambra*, 236 F.3d 568, 571, 574 & n.1 (9th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001). But that is not our case.

at 171-72. It is an exercise in hindsight to fault the district court for failing to anticipate the development of the law on an issue that was not briefed or presented to the district court. Similar considerations apply to the opinion's treatment of the district court's failure to advise Smith of the withdrawal and abeyance procedure; a procedure we did not endorse until *after* Smith's second petition was dismissed. *See Calderon v. United States Dist. Ct. (Taylor)*, 134 F.3d 981, 986-88 (9th Cir. 1998). Even if the district court's failure to anticipate these later developments was error, *see Ford v. Hubbard*, 305 F.3d 875, 886-87 (9th Cir. 2002), they do not justify equitable tolling because Smith's meandering to and from state court following the district court's dismissal of his second petition constitutes unreasonable delay. *See Ford*, 305 F.3d at 888 n.12 (basing relief from statute of limitations in part on petitioner's prompt effort in going to and returning from state court following initial dismissal).

The district court's (1) failure to allow Smith to amend his petition, (2) failure to warn Smith of the looming statute of limitations, and (3) failure to advise Smith of the withdrawal and abeyance procedure do not entitle Smith to equitable tolling *on the facts of this case.*

D

The opinion of the court focuses on the district court's perceived errors and ignores Smith's role in creating his statute of limitations problem. In addition to Smith's persistence in bringing unexhausted claims, the statute of limitations would not have barred Smith's petition if Smith had not, in the face of AEDPA's statute of limitations, waited over four months after the California Supreme Court denied his July 1996 state petition before filing his second federal petition.[4/] If Smith had moved

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4. During the first 30 days following the California

promptly in returning to federal court, i.e. within 30 days, he still would have had 19 days left on the statute of limitations after the district court's dismissal of the second petition.[5] *See Zarvela v. Artuz*, 54 F.3d 374, 381 (2d Cir. 2001), *cert. denied*, 534 U.S. 1015 (2001) (characterizing 30 days as a reasonable interval of time for returning to federal court following exhaustion). Even these calculations do not fully reflect Smith's lack of diligence because they do not incorporate the additional 140 days that lapsed while Smith amended his second federal petition to address other deficiencies.[6]

Supreme Court's denial of Smith's state habeas petition, the statute of limitations was statutorily tolled. *See Bunney v. Mitchell*, 262 F.3d 973, 974 (9th Cir. 2001). Smith filed his second federal petition 101 days after this thirty-day "grace" period expired and 131 days after the California Supreme Court's ruling.

5. Smith had 294 days left on the statute of limitations when the California Supreme Court dismissed his July 1996 state petition. Smith's second federal petition was pending before the district court for 275 days. This is about average for a habeas petition dismissed on procedural grounds. *See Duncan*, 533 U.S. at 186 (Breyer, J., dissenting) (on average district courts take 268 days to dismiss petitions on procedural grounds, nearly half of these petitions are pending in district court for six months or longer).

6. The court's opinion holds that the entire time the petition was pending is subject to equitable tolling, relying on *Tillema v. Long*, 253 F.3d 494, 503-04 (9th Cir. 2001). This rote application of *Tillema* is inconsistent with the fact-intensive nature of equitable tolling, *see Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc), and the holding in *Corjasso*, 278 F.3d at 878-79, which only excludes the period of time during the pendency of a federal petition that is attributable to "extraordinary circumstances." In *Tillema* there

Finally, the opinion of the court ignores the 109 days (excluding potentially tolled time) that Smith spent going to and returning from state court following dismissal of the second petition. This delay is unreasonable, particularly given the extra 30 days of tolling Smith would be entitled to after the California Supreme Court's rejection of his last state petition if the statute of limitations had not already run.[7]

Smith's lack of diligence lies at the root of his statute of limitations problem. Smith is directly responsible for at least 421 days of the delay between the starting of the statute of limitations and Smith's filing of his third federal petition.[8]

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is no indication that the petitioner had any fault in the failure to comply with AEDPA's statute of limitations. That cannot be said in this case.

7. *See Palmer v. Carlton*, 276 F.3d 777, 781-82 (6th Cir. 2002) (refusing to use equitable tolling where petitioner took more than two months to return to federal court); *Bunney*, 262 F.3d at 974 (holding that habeas petitioners are entitled to an additional 30 days tolling following dismissal of their state petitions by the California Supreme Court); *see also Zarvela*, 254 F.3d at 381 (characterizing 30 days as "reasonable" time for each leg of trip to and from state court); *Kelly v. Small*, 315 F.3d 1063, 1071 (9th Cir. 2003) (stating that 30 days to return to federal court "seems reasonable"); *Ford v. Hubbard*, 305 F.3d 875, 888 n.12 (9th Cir. 2001) (endorsing test of "reasonable" time announced in *Zarvela*).

8. This figure represents the 71 days of the limitations period that elapsed before Smith filed his July 1996 state petition, *supra* at n.3, the 101 further days that elapsed before Smith filed his second federal petition, the 140 days of delay attributable to Smith during the pendency of the second petition, and the 109 days during which the limitations clock was running following dismissal of Smith's second petition before

Cumulatively, Smith's role in the untimely filing of his third petition makes equitable tolling inappropriate.

E

In another situation where a *pro se* party failed to follow explicit instructions as to how to preserve a claim, the Supreme Court held:

> The simple fact is that Brown was told three times what she must do to preserve her claim, and she did not do it. One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984). The same principle applies here, as does the Supreme Court's admonition that "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County*, 466 U.S. at 152; *see also National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 2072 (2002) (quoting *Baldwin County*).

F

The record in this case establishes that: (1) Smith knew the claims he needed to exhaust after the first petition was dismissed, but did not immediately proceed to exhaust *all* of these claims; (2) Smith used up over three months of the limitations period before filing his second petition; (3) Smith used up another four months of the limitations period fixing

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he filed his third federal petition.

deficiencies in his second petition; (4) Smith failed to request another opportunity to amend his petition even after he knew his second petition was subject to dismissal, and then (5) Smith unreasonably took his time going to and returning from state court following dismissal of his second petition. Smith is not entitled to equitable tolling for his third petition. The conduct of proceedings in the district court are insufficient to shift responsibility for the untimely third federal petition from Smith's shoulders.

III

In its zeal to modify the district court's judgment dismissing Smith's second federal petition, the court's opinion wrongly applies equitable tolling and overlooks the facts demonstrating that Smith's own actions and lack of diligence caused the untimely filing of his third federal petition. Equitable tolling principles need not be applied to cure Smith's neglect.

I respectfully dissent.

FILED
AUG. 08 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES EDWARD SMITH, Petitioner-Appellant, v. J.M. RATELLE; B. KATHLEEN BLANCHARD, Respondents-Appellees.	No. 99-55824 D.C. NO. CV–98-05747-R-EE ORDER

Before: BROWING, PREGERSON, and BEEZER, Circuit Judges.

Judge Browning votes to deny the Petition for Panel Rehearing and recommends denying the Petition for Rehearing En Banc. Judge Beezer votes to grant the Petition for Panel Rehearing and recommends granting the Petition for Rehearing En Banc. Judge Pregerson votes to deny the Petition for Panel Rehearing and the Petition for Rehearing En Banc.

Appellees' Petition for Rehearing and Suggestion for Rehearing En Banc are DENIED.

IT IS SO ORDERED.

FILED
MAR 5 1999
ENTERED
MAR 9 1999
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY____/s/___ DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD SMITH, Petitioner, v. J.M. RATELLE, etc., et al., Respondents.	Case No. CV 98-5747-R (EE) JUDGMENT

IT IS ADJUDGED that the petition herein is dismissed with prejudice.

Dated: March 3, 1999

/s/
Manuel L. Real
United States District Judge

FILED
MAR 5 1999
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD SMITH, Petitioner, v. J.M. RATELLE, etc., et al., Respondents.	Case No. CV 98-5747-R (EE) ORDER ACCEPTING AND ADOPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the petition and all of the records and files herein. The Court accepts and adopts the findings and recommendations of the United States Magistrate Judge in the reports and recommendations attached hereto ("reports") and orders that judgment be entered dismissing the petition with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve

copies of this Order, the reports, and the Judgment herein by United States mail on all parties.

Dated: March 3, 1999

/s/
Manuel L. Real
United States District Judge

FILED
MAR 2 1999
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD SMITH, Petitioner, v. J.M. RATELLE, etc., et al., Respondents.	Case No. CV 98-5747-R (EE) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Final Report and Recommendation and the attached Report and Recommendation ("reports") are submitted to the Honorable Manuel L. Real, United States District Judge, pursuant to 28 U.S.C. § 636.

On December 9, 1998, the Clerk filed Report and Recommendation of United States Magistrate Judge, together with a notice of filing thereof. Both were served on the parties.

Petitioner filed objections to the report and recommendation on February 4, 1999. Having carefully considered the objections, the magistrate judge finds no reason set forth for changing the recommendation in any respect.

1. Petitioner's objections.

The report and recommendation recommended that the petition be dismissed as barred by the 1-year statute of limitations of the AEDPA. Petitioner's objections filed February 4, 1999 are unclear; however, liberally construed, they may be read to make 3 objections to the report and recommendation:

- That Magistrate Judge Edwards did not have authority to vacate a November 4, 1998 non-dispositive order entered by Magistrate Judge Jones that denied respondents' motion to dismiss;
- That the filing date of petitioner's present petition should "relate back" to the filing date of one of the

earlier petitions that petitioner has filed in this Court; and

- That the statute of limitation under the AEDPA has not expired.

2. Petitioner's objection to the vacating of the November 4 order is without merit.

On September 24, 1998, respondents filed a motion to dismiss the present petition on the grounds that the 1-year statute of limitations under the AEDPA had already run when the petition was filed. On November 4, 1998, Magistrate Judge Jones, to whom the petition was then assigned, denied the motion to dismiss. The basis for the denial was that the present petition was deemed to relate back to March 7, 1996, the date that a previous petition was filed by petitioner in this Court.

On November 19, 1998, the petition was randomly reassigned and referred to Magistrate Judge Edwards after Magistrate Judge Jones recused herself. After receiving the file, Magistrate Judge Edwards vacated the November 4 order. (*See*

minute order filed December 3, 1998.) Thereafter, on December 9, 1998, Magistrate Judge Edwards filed the report and recommendation herein recommending that the petition be dismissed as time-barred under the AEDPA.

Petitioner's objections to the vacating of the November 4 order is plainly untimely. (*See* Rule 72(a), F.R.Civ.P.) Moreover, no authority (except a non-existent rule, "local rule 75-303") is cited to support petitioner's objection.

General Order 194 § I.A.-4 and Rule 1.4, Local Rules Governing Duties of Magistrate Judges, provide for the referral of habeas corpus petitions to magistrate judges in this district. Referral of the petition to the magistrate judge herein delegated authority as follows:

> Pursuant to the provisions of the Local Rules Governing Duties of Magistrate Judges, the within action has been . . . referred to [the magistrate judge], who is authorized to consider preliminary matters and conduct all further

> hearings as may be appropriate or necessary. Thereafter, unless the Magistrate Judge determines that trial by a District Judge is required, the Magistrate Judge shall prepare a report and recommendation and file it with the Clerk of the Court together with proposed findings of fact and conclusions of law . . . .

(*See* Notice of Reference to a U.S. Magistrate Judge, form CV-25, filed July 17, 1998.)

The Local Rules Governing Duties of Magistrate Judges in this district further provide:

> Except as specifically provided to the contrary herein, full-time United States Magistrate Judges of this Court are authorized to perform all of the duties prescribed and authorized by 28 U.S.C. Sec. 636 et seq. and any other statutes which authorize Magistrate Judges to perform judicial functions, as may hereafter be assigned

> by General Order of this Court. Magistrate Judges shall exercise (i) all of the authority included in the delegations, appointments, and grants to the Magistrate Judges, and (ii) all powers reasonably necessary to implement and give effect to such delegations, appointments, and grants to the extent permitted by law . . . .

Magistrate Judge Edwards was required by General Rule 194 to make a recommendation to the district judge in this case. Since his recommendation was to dismiss the petition as late-filed under the statute of limitations, it was plainly necessary first to vacate the earlier order that had denied the motion to dismiss on that ground. Also, it cannot be disputed that a judge may vacate his or her own prior order upon reconsideration. No distinction is seen in this case based simply on the fact that the Court replaced one magistrate judge with a different one. The magistrate judge's authority now is no different than it would be if he had been assigned the petition since the action was

commenced. Accordingly, petitioner's objection is not persuasive.

3. The AEDPA does not permit the present petition to "relate-back" to the filing date of petitioner's 1996 petition.

Petitioner contends that "applying the relationback doctrine per FRCP 15(c)(2) [sic]" the filing date of his present petition should "relate back" to the filing date of his first federal petition filed in this Court on March 7, 1996. In that case, styled "James Edward Smith v. Santa Monica Superior Court," CV 96-1641-R (RNB), judgment was entered on June 13, 1996 dismissing the petition for failure to exhaust available state remedies. (*See* respondents' motion for reconsideration, filed November 19, 1998, exh. D.) Subsequently, petitioner filed a second federal petition on February 4, 1997. That petition was also dismissed for failure to exhaust available state remedies on or about November 3, 1997. (*Id.*, exh. I.) The instant petition is petitioner's third filed in this Court.

Although petitioner did not make his "relation back" argument in opposing respondents' motion to dismiss and, indeed, presented it for the first time in his objections to the report and recommendation, the magistrate judge will nonetheless consider it on the merits. The "relation back of amendments" provision of Rule 15(c)(2), F.R.Civ.P., states: "An amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." The plain language of this rule contemplates amendments of pleadings within pending cases. In other words, the rule might apply when a party amends a petition in a pending case, but nothing in the rule suggests that it could ever apply to permit filing a amended pleading in a closed case to obtain the filing date of the initial pleading in the closed case. In petitioner's case, the filing date of his third petition in federal court cannot be construed to "relate back" to either of the earlier

filing dates, because both of those previous petitions had already been dismissed, judgments had been entered and were no longer appealable, and the cases had been long closed.

Petitioner himself cites no authority supporting his novel construction of Rule 15. Presumably, he adopts the rationale relied on when Judge Jones originally denied respondents' motion to dismiss. However, none of the cases relied on in Judge Jones' "Memorandum Opinion [etc.]" filed November 4, 1998 actually "related back" the filing date of a new action to a previously dismissed case. Three cases were relied on: *Anthony v. Cambra*, 1998 WL 16491 (N.D.Cal. February 18, 1998); *Williams v. Vaughn*, 3 F.Supp.2d 567 (1998); and *Kethley v. Berge*, 14 F.Supp.2d 1077 (1998).

In *Anthony v. Cambra*, the court did discuss Rule 15 in the context of relating a petitioner's claim in a second petition to the filing date of an earlier petition to avoid the statute of limitations; however, the discussion was dicta, since the Court held that the second petition had, in any event, been timely filed

before the statutory period ran. 1998 WL 16491 *3. Moreover, the Rule 15 discussion was based on the premise that the first petition had been erroneously dismissed without permitting the petitioner to simply amend it to delete unexhausted claims. (Instead, the petitioner had been erroneously required to file a new petition, which received a new filing date, immediately after the first one was dismissed.)

In *Williams v. Vaughn*, the petitioner filed a first petition before the AEDPA was enacted and filed an Amended Petition after its enactment. The court held that pre-AEDPA standards applied, since the Amended petition related back to the pre-AEDPA filing. 3 F.Supp.2d at 571. This was a straightforward application of Rule 15 and did not involve applying an amendment to a closed case as petitioner seeks here.[1/]

In *Kethley v. Berge*, the court dismissed a 3-year old petition as unexhausted, but stated that under the circumstances

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1. The *Williams* court also dismissed the Amended Petition as unexhausted, but specifically did so without prejudice to petitioner's filing a Second Amended Petition containing only exhausted claims. 3 F.Supp.2d at 578.

it would permit petitioner to reopen the petition with the same case number after he exhausted the claims. The decision did not involve Rule 15, and, in fact, the relief fashioned was designed precisely to avoid what petitioner seeks here: to rely on the filing date of a 1996 petition in a different action filed 2 years later.

In short, there is no precedent for applying Rule 15, F.R.Civ.P., to relate claims back to closed cases. Even if the rule could be construed to give the Court discretion to do so, it would not be justified in petitioner's case. Petitioner's abuse of the system is self-evident: he initiated 3 separate federal actions before finally presenting a petition with exhausted claims. Allowing the filing date in the last petition to relate back to petitioner's first petition would eviscerate the 1-year statute of limitations set by Congress. Any petitioner could prematurely file an unexhausted federal petition simply to "preserve" the early filing date for relation back later. The result would be to toll the statute of limitations indefinitely. Congress simply

could not have intended this result. As discussed below, Congress specifically identified the filings and events that could toll the running of the statute of limitations. The filing of prior federal habeas petitions cannot be read into the law as an additional method of tolling.

Accordingly, petitioner's objection that the present (third) federal petition should relate back to the filing date of his first federal petition is without merit.

4. The AEDPA does not permit the statue of limitations to be tolled during the pendency of federal habeas petitions.

Petitioner's final objection is based on his assumption that the statute of limitations should be deemed tolled during the periods that he had *federal* petitions pending in this Court.[2/]

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2. There is no dispute over the tolling of the statute of limitations while petitioner had sate habeas petitions pending. Here, however, petitioner seeks tolling for the following periods during which prior unexhausted federal petitions were pending in this Court: April 24, 1996 (the date the AEDPA was enacted) through June 10, 1996; and February 4, 1997 through November 3, 1997.

Congress, however, has only authorized tolling as set forth in 28 U.S.C. § 2244(d)(2). If § 2244(d)(2) does not toll the running of the statute during the pendency of federal habeas petitions, the present petition is indisputably untimely, as detailed in the report and recommendation. Section 2244(d)(2) reads as follows:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment of claim is pending shall not be counted toward any period of limitation under this subsection.

Determining whether the AEDPA contemplates application of § 2244(d)(2) to collateral proceedings in federal court requires analysis of the scope of the phrase "a properly filed application for State post-conviction or other collateral review." More specifically the issue is whether the law covers applications filed in federal court as well as applications filed in state court.

Other courts that have considered the question have concluded that previously filed federal petitions do not toll the running of the statute of limitations. *Sperling v. White*, 30 F.Supp.2d 1246 (C.D.Cal. 1998); *Babcock v. Duncan*, 1997 WL 724450 (N.D.Cal., November 12, 1997). The magistrate judge agrees with these decisions.

In interpreting a statute, the Court "'look[s] first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress. Then, if the language of the statute is unclear,'" the Court may look to the traditional canons of statutory interpretation and to the statute's legislative history. *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 830-831 (9th Cir. 1996) (quoting *Alarcon v. Keller Industries, Inc.*, 27 F.3d 386, 389 (9th Cir. 1994)).

To determine whether the language of a statute is plain, one first should give the statutory language a "natural reading." *See generally United States v. Wells*, 519 U.S. 482, 137 L.Ed.

2d 107 (1997). So-read, § 2244(d)(2) cannot be construed to toll the limitations period during the time a habeas petition is pending in **federal** court. That the word "State" modifies both "post-conviction" and "other collateral" in the phrase "a properly filed application for State post-conviction or other collateral review" is inescapable. To construe "State" as modifying "post-conviction" and "review," but not the intervening words "other collateral," strains the plain meaning of the words. If the phrase were so-construed, it would render the words "State post-conviction or other" mere surplusage, and the tolling provision could be simply restated as: "the time during which a properly filed application for collateral review . . . is pending shall not be counted . . . ." This construction would violate a cardinal principle of statutory construction which is "to give effect, if possible, to every clause and word of a statute." *Bennett v. Spear*, 520 U.S. 154, ____, 137 L.Ed.2d 281, 302 (1997).

Finally, it is analytically illogical to rely on any petition that is dismissed as unexhausted to toll the statute of limitations.

> Absent a savings statute which specifically permits a plaintiff to refile an action after a dismissal . . . , the law is clear that a dismissal without prejudice leaves the situation the same as if the suit had never been brought.

Parker v. Marcotte, 975 F. Supp. 1266, 1269 (C.D.Cal. 1997) (internal quotations omitted); *accord Ford v. Sharp*, 758 F.2d 1018, 1023 (5th Cir. 1985) ("[f]or purposes the statute of limitations, the plaintiff receives no credit or tolling for the time that elapsed during the pendency of the original suit"); *Humphreys v. United States* 272 F.2d 411, 412 (9th Cir. 1959) (dismissal without prejudice "leaves the situation the same as if the suit had never been brought in the first place"); *Spannaus v. U.S. Dept. of Justice*, 643 F.Supp. 6989, 703 (D.C. 1986), *aff'd.* 824 F.2d 52 (D.D.C. Cir. 1987) ("the dismissal without prejudice did not affect the running of the statute").

In short, a fair reading of § 2244 (d)(2) does not permit tolling of the statute of limitations by filing a federal petition. To so construe it would not only violate the statute's plain meaning, but would also permit a unilateral extension or evasion of the limitations period that is without precedent.

IT IS THEREFORE THE FINAL RECOMMENDATION that the Court accept and adopt the findings and recommendation in these reports and dismiss the petition with prejudice.

Dated: March 1, 1999

/s/
Elgin Edwards
United States Magistrate Judge

FILED
DEC 9 1998
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY___/s/___ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD SMITH, Petitioner, v. J.M. RATELLE, Warden, et al., Respondents.	Case No. CV 98-5747-R (EE) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Manuel L. Real, United states District Judge, pursuant to 28 U.S.C. § 636.

1. Background

Petitioner is a state prisoner. In 1992 he was convicted of first degree burglary and admitted 3 prior felony convictions and 3 prior prison terms. He was sentenced to 22 years imprisonment. (motion to dismiss, exh. A.). On July 27, 1994,

the California Court of Appeal modified the sentence to credit 458 day of time served and otherwise affirmed the judgement. (*Id.*, exhs. B and C.) The California Supreme Court denied review on November 2, 1994. (*Id.*, exhs. D and E.)

2. The petition is time-barred by the statute of limitation of the Antiterrorism and Effective Death Penalty Act of 1996.

a. Prior state and federal habeas proceedings.

On March 31, 1996, petitioner filed a petition for habeas relief in this Court, which the Court dismissed on June 13, 1996 for failure to exhaust state remedies. Thereafter, on July 10, 1996, petitioner filed a habeas petition in the California Supreme Court, which was denied on September 25, 1996. (motion to dismiss, exhs. F and G and H.) On April 11, 1997, petitioner again filed a habeas petition in this Court, and, again, on November 3, 1997, the petition was dismissed for failure to exhaust state remedies. (*Id.*, exhs. I, J and K.) Thereafter, on January 7, 1998, petitioner filed another petition for writ of

habeas corpus in the California Supreme Court. That state petition was denied on April 29, 1998. (*Id.*, exhs. L and M.)

b. The present proceedings.

Petitioner filed the instant petition on July 28, 1998. Respondents filed a motion to dismiss the petition as time-barred by the 1-year statute of limitation of the Antiterrorism and Effective Death Penalty Act of 1996 (28 U.S.C. § 2244(d) as amended) ("AEDPA"). On October 29, 1998, petitioner filed opposition to the motion. Respondents were not permitted to reply. (*see* minute order dated September 28, 1998.) On November 4, 1998, Magistrate Judge Jones filed a Memorandum and Order Denying Respondent's Motion to dismiss etc. and simultaneously issued a minute order setting a briefing schedule. On November 19, 1998, the petition was reassigned from Magistrate Judge Jones to Magistrate Judge Elgin Edwards. By order dated December 4, 1998, Magistrate Judge Edwards vacated both the November 4 Memorandum and

Order and the November 4 briefing schedule filed by Judge Jones.

c. The 1-year statute of limitation under the AEDPA had expired when petitioner filed the present petition.

The magistrate judge has reconsidered respondents' motion to dismiss the petition and recommends that it be granted and that the petition be dismissed. The AEDPA's statute of limitation applies to petitioner's presentation of claims in this Court.[1/] *Calderon v. U.S. District Court (Beeler)*,

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1. 28 U.S.C. § 2244(d)(1) states: A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

128 F.3d 1283, 1286-1287 (9th Cir. 1997). The denial of Petitioner's state appeal became final in 1995. (*see* motion to dismiss, exh. E.) The AEDPA was enacted on April 24, 1996. Thus, the statute began to run on April 24, 1996, and the last date for petitioner to timely file his federal petitioner was April 23, 1997. *Calderon v. U.S. Dist. Court*, 112 F.3d 386, 388, 389 (9th Cir. 1997). Because petitioner filed an application for state post-conviction relief during the time that statute of limitation would otherwise have been running, a tolling analysis pursuant to § 2244(d)(2) is necessary.[2/] Under this analysis, the April 23, 1997 date for expiration of the 1-year period within which petitioner could timely file his federal petition is extended by the number of days the statute of limitation was tolled.

As set out above, petitioner filed an "application for State post-conviction or other collateral review" on July 10,

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2. 28 U.S.C. § 2244(d)(2) states: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

1996. Petitioner is entitled to tolling of 78 days for the period from July 10, 1996 through September 25, 1996 (the time during which his petition for writ of habeas corpus was pending before the California Supreme Court). That tolled time thus extended the deadline for filing the present petition from April 23, 1997 to July 10, 1997. Petitioner did not file the petition herein until July 28, 1998, 383 days too late.[3]

Accordingly, the petition is time-barred.

3. Recommendation.

Based on the foregoing, IT IS RECOMMENDED that

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3. Petitioner did not even file his second state petition in the California Supreme Court until January 7, 1998, 181 days after the statute of limitation had expired on July 10, 1997. Thus, the pendency of that petition could not further toll the already-expired limitation period. In any event, even if this Court credited petitioner with the 113 days from January 8 to April 29, 1998 (for the period that the second petition was pending in the California Supreme Court), petitioner's present petition would still be deemed filed 270 days too late.

the Court adopt this report and recommendation and dismiss the petition with prejudice.

Dated: December 8, 1998.

/s/
Elgin Edwards
United States Magistrate Judge

LODGED
SEP 30 1997
FILED
NOV 3 1999
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD SMITH, Petitioner, v. J.M. RATELLE, Warden, et al., Respondent(s).	No. CV 97-0731 R (AIJ) **JUDGMENT**

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the petition is denied and dismissed without prejudice.

Dated: this 3rd day of November, 1997.

/s/
Manuel L. Real
United States District Judge

LODGED
SEP 30 1997
FILED
NOV 3 1999
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD SMITH, Petitioner, v. J.M. RATELLE, Warden, et al., Respondent(s).	No. CV 97-0731 R (AIJ) ORDER ACCEPTING AND ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered dismissing the Petition without prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on petitioner and counsel for the respondents.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: Nov. 3, 1997

/s/

Manuel L. Real
United States District Judge

FILED
SEP 30 1997
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD SMITH, Petitioner, v. J.M. RATELLE, Warden, et al., Respondent(s).	No. CV 97-0731 R (AIJ) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Manuel L. Real, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus by a Person in State Custody" on February 4, 1997. The operative pleading, however, is petitioner's second amended petition as supplemented by petitioner on June 26, 1997.

Respondents filed a motion to dismiss the second amended petition, as supplemented, for failure to exhaust state court remedies on July 28, 1997. Petitioner filed his opposition to respondents' motion on August 25, 1997. No reply having been filed, respondents' motion to dismiss is now under submission and ready for decision.

DISCUSSION

For the reasons discussed herein, the petition should be dismissed without prejudice. A federal court will not grant a state prisoner's petition for writ of habeas corpus unless it appears that the petitioner has fully exhausted available state court remedies with respect to each of the issues presented. 28 U.S.C § 2254(b), (c); Presser v. Rodriguez, 411 U.S. 475, 489-

490, 93 S. Ct. 1827, 1836 (1973); Rose v. Lundy, 455 U.S. 509, 522, 102 S. Ct. 1198, 1205 (1982); Duncan v. Henry, 513 U.S. 364, 365-66, 115 S. Ct 887-887-88 (1995) (per curiam). Considerations of federalism require that federal courts give the states an initial opportunity to correct alleged violations of their prisoners' federal rights. Presser, 411 U.S. at 490, 93 S. Ct. at 1836; Kellotat v. Cup, 719 F.2d 1027, 1029 (9th Cir. 1983).

Exhaustion requires that the petitioner fairly present his or her federal claims to the highest court of the state. Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 512 (1971). A petitioner has not fairly presented a claim unless he or she has described in the state court proceedings both the operative facts and the federal legal theory on which the claim is based. See Duncan v. Henry, 513 U.S. at 365, 115 S. Ct. at 888; Anderson v. Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277 (1982).

Petitioner has the burden of demonstrating exhaustion of available state remedies. See, e.g., Brown v. Cuyler, 699 F.2d 155, 161 (3d Cir. 1982); Keating v. Hood, 922 F.Supp. 1482,

1490 (C.D. Cal. 1996). Petitioner has failed to carry this burden.[1/]

In the supplement to the second amended petition, petitioner alleges seven claims: (1) an error in the verdict form adversely affected petitioner's sentence (Suppl. to Pet., at 1); (2) ineffective assistance of counsel based on "untimely objections at critical stages in the proceedings" (id., at 2); (3) what petitioner calls his "once in jeopardy" claim, evidently based on misuse of a probation officer's report (id., at 3); (4) what, for lack of a better name, will be called petitioner's "juror challenge" claim[2/] (id., at 4); (5) erroneous admission of evidence, including petitioner's prior statement to a police

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1. Because the amendments to 28 U.S.C. §2254(b) enacted by the Antiterrorism and Effective Death Penalty Act of 1996 ("Act") preserve the exhaustion requirement, the Court need not and does not resolve the Act's applicability to this action.

2. Claim 4 reads in full:

"Ground Four: [¶] Challenge the jurors for cause/Attorney, client: Court's proceedings not for 'Layman.' 'Excluded:' [¶] Facts supporting: 'None.' [¶] Begging the court's forgiveness, and respondent's." (Emphasis in original).

officer that he was a "cat burglar[]" (id., at 5; (6) a sentencing error claim (id., at 6); and (7) error by the trial court in failing to give, sua sponte, CALJIC 2.71.7, regarding use of oral admissions. (Id., at 7).

Respondents argue in their motion to dismiss that: (1) claim six, the sentencing error claim, has not been exhausted because it has never been presented to the California Supreme Court (Motion To Dismiss, at 7-8), and (2) claim four, the "juror challenge" claim, though presented to the California Supreme Court, has not been exhausted because that court dismissed it on procedural grounds. (Motion To Dismiss, at 9-11).

The first contention need not detain the court long. Respondents' copy of petitioner's state habeas corpus petition clearly shows that petitioner presented his sentencing error claim to the California Supreme Court. (Motion To Dismiss, Exh. F, at F70).

The second contention is meritorious. Petitioner's "juror challenge" claim as set forth in his petition for writ of habeas corpus to the California Supreme Court reads:

> "Ground Four: - Challenge the jurors for cause; attorney-client, court precedures. [Not for a "layman". Myself!]
> At the beginning of the court's proceeding, one juror misconduct excused her. [sic] (RT. 1) Another misconduct, juror #1 talks to "bailiff" soto-voce. No objections, then at the end of trial - - in polling the jurors, again juror #1 misconduct - by not been [sic] in 'certituded [sic], or inconsistent with the conviction'."

(Motion To Dismiss, Exh. F, at F66-F67 (emphasis in original)). The California Supreme Court denied the petition, citing In re Swain, 34 Cal. 2d 300, 304, 209 P. 2d 793, 796 (1949), cert. denied sub nom. Swain v. Duffy, 338 U.S. 944, 70 S. Ct. 425 (1950), and In re Waltreus, 62 Cal.3d 218, 225, 42 Cal. Rptr. 9, 13, 397 P. 2d 1001, 1005, cert. denied sub nom. Waltreus v. California, 382 U.S. 853, 86 S. Ct. 103 (1965). (Motion to Dismiss, Exh. G, at G98).

Waltreus is not a bar to federal habeas review of petitioner's claims. See Fields v. Calderon, __ F.3d __, __n.5,

97 Daily Journal D.A.R. 11,757, 11760n.5 (9th Cir. Sept. 10, 1997) ("a claim barred from further state court review by the Waltreus rule would not be barred from review in federal habeas, as it would be an exhausted claim.").

Swain holds that facts relied on in a California habeas petition must be alleged with particularity. See Ylst v. Nunnemaker, 501 U.S. 797, 805, 111 S. Ct. 2590, 2595-96 (1991). A denial of a state habeas petition with citation to Swain is a denial on procedural grounds, leaving state remedies unexhausted, unless the claims nevertheless were fairly presented to the California Supreme Court. Kim v. Villalobos, 799 F.2d 1317, 1319-20 (9th Cir. 1986) (holding that claims were fairly presented because they were incapable of being alleged with any greater particularity); Harris v. Superior Court, 500 F.2d 1124, 1128 (9th Cir. 1974), Cert. denied sub nom. California v. Harris, 420 U.S. 973, 95 S. Ct. 1394 (1975).

Petitioner has not exhausted his state remedies as to his "juror challenge" claim. It is not clear from petitioner's state

habeas filing what the facts of his claim are or whether this claim rests on a legal theory of juror misconduct, ineffective assistance of counsel, or some other basis. Therefore, petitioner has not fairly presented the California Supreme Court with either the factual basis or the federal constitutional theory for this claim. Because the claim is capable of being alleged with greater particularity, the state court's citation of Swain means it is not exhausted.

Petitioner still may be able to present his unexhausted constitutional claim to the California Supreme Court.[3/] See, e.g., In re Harris, 5 Cal. 4th 813, 825, 21 Cal. Rptr. 2d 373, 378 (1993) ("Habeas corpus has become a proper remedy in this state to collaterally attack a judgment of conviction which has been obtained in violation of fundamental constitutional rights.") (citations and quotations omitted); People v. Sorenson,

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3. The Court expresses no opinion whether the principles discussed in In re Clark, 5 Cal. 4th 750, 763-87, 21 Cal. Rptr. 2d 509, 517-34 (1993) might bar consideration of a new state habeas petition filed by this petitioner. The California Supreme Court should evaluate this matter in the first instance.

111 Cal. App. 2d 404, 405 (1952) (claims that fundamental constitutional rights have been violated may be raised by state habeas petition).

Even though petitioner may have exhausted his state remedies with respect to his other claims, a district court must nevertheless dismiss habeas corpus proceedings which raise both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. at 522, 102 S. Ct. at 1205; Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988). Following dismissal, petitioner will have the option of: (1) submitting to this court a new habeas petition that does not contain any unexhausted claims (which would risk forfeiture of these claims under Rule 9(b) of the Rules Governing § 2254 Cases in the United States District Courts); or (2) exhausting his state remedies and then submitting to this court a petition which contains all of the claims raised in the present proceeding. Guizar, 843 F.2d at 372.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the petition without prejudice.

DATED: September 30, 1997.

/s/
Ann I. Jones
United States Magistrate Judge

NOTICE

Reports And Recommendations are not applicable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No. **CV 97-0731-R (RNB)** Date: **June 16, 1997**

Title: **JAMES EDWARD SMITH v. MR. J.M. RATELLE, ET AL.**

DOCKET ENTRY

PRESENT:

HON. ROBERT N. BLOCK,
UNITED STATES MAGISTRATE JUDGE

Marsha Eugene	n/a
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None Present	None Present

PROCEEDINGS: (IN CHAMBERS)

Petitioner's "Motion to Amend Memorandum of Points and Authority to the Second Amended Petition" is ORDERED filed. The motion is DENIED. Upon further review of the Second Amended Petition, the Court has concluded that petitioner did not sufficiently remedy the deficiencies noted in the Court's March 14, 1997 Order Dismissing First Amended Petition with Leave to Amend, and that is still is not clear to the Court what grounds petitioner is now purporting to allege. Accordingly, within 20 days of the date of this Minute Order, Petitioner is ORDERED to serve on respondents' counsel and file with the Court a document entitled "Supplement to Second

Amended Petition." In this document, petitioner is ORDERED to list each separate Ground which he is now purporting to allege herein **on a separate page,** as well as the facts upon which petitioner is relying in support of that particular Ground. Thus, for example, if petitioner is now purporting to allege 7 separate Grounds in the Second Amended Petition, his "Supplement to Second Amended Petition" should contain 7 separate pages (i.e., one separate page for each Ground), in addition to the cover page and the proof of service page. No exhibits or tables of authorities should be included with or attached to the "Supplement to Second Amended Petition." The Court just wants to know what Grounds petitioner is now purporting to allege herein.

In the meantime, pending further order of the Court, respondents' time to file a dispositive Motion to Dismiss and/or an Answer on the merits shall be tolled.

INITIAL OF DEPUTY CLERK ___/s/___

FILED
MAR 14 1997
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD SMITH, Petitioner, v. MR. J. M. RATELLE, et al., Respondents.	Case No. CV 97-0731-R (RNB) ORDER DISMISSING FIRST AMENDED PETITION WITH LEAVE TO AMEND

Petitioner's First Amended Petition, lodged on March 10, 1997, is ORDERED filed.

The Court has duly reviewed the First Amended Petition and the exhibits thereto (including the copy of petitioner's habeas petition to the California Supreme Court), and compared those documents to the original Petition filed herein on February 4, 1997. As the Court noted in its February 10, 1997 dismissal order, the Petition filed herein on February 4, 1997 was merely a photocopy of the Petition filed by petitioner on March 7, 1996

in Case No. CV 96-1641-R. That Petition had been dismissed without prejudice on account of petitioner's failure to exhaust his state remedies with respect to Grounds 1, 2, 3, 4 and 6 alleged herein.

It appears from the Court's review of petitioner's habeas petition to the California Supreme Court that petitioner did attempt to exhaust previously unexhausted Grounds 1, 2, 3 and 4, and that petitioner did not attempt to exhaust previously unexhausted Ground 6 (i.e., petitioner's sentencing error claim).

However, it is not clear to the Court from its review of petitioner's First Amended Petition herein what Grounds petitioner is now purporting to allege. In this regard, the Court notes that Ground 2 at the bottom of page 6 is not filled in, although the Court presumes from comparing the facts recited at the top of page 7 to petitioner's original Petition herein that petitioner is purporting to allege the same ineffective assistance of counsel claim. The Court further notes that the First Amended Petition does not include previously exhausted

Ground 5 from petitioner's original Petition (i.e., petitioner's claim relating to the failure to exclude the evidence of petitioner's admission to the 1989 burglary). Nor is it entirely clear to the Court whether petitioner intended to include in the First Amended Petition previously exhausted Ground 7 from petitioner's original Petition (i.e., petitioner's claim relating to the trial court's failure to give CALJIC No. 2.71.7 sua sponte). The Court notes that Ground 7 is repeated on three handwritten pages attached to the exhibits which conceivably are intended by petitioner to constitute part of the First Amended Petition, but this is not entirely clear.

The Court therefore finds and concludes that the First Amended Petition does not allege petitioner's claims with sufficient clarity to enable respondents to file a response. Accordingly, the Court has decided not to order service yet. Instead, the First Amended Petition is dismissed with leave to amend. Concurrently with the service copy of this Order, the clerk is directed to send petitioner another blank Central District

habeas form, which petitioner is ORDERED to complete, date and sign and submit for filing within 30 days of the date of this Order. Petitioner's resubmission should bear the case number assigned to this matter (i.e., CV 97-0731-R (RNB)), and be clearly labeled Second Amended Petition. It will not be necessary for petitioner to attach any of the previously-submitted exhibits to his First Amended Petition. However, petitioner should be sure to state with particularity in ¶ 10 (in the spaces provided on pages 6-7, and on attached pages to the extent he is alleging more than four Grounds) all of the Grounds which he is now raising.

DATED: March 14, 1997

/s/

ROBERT N. BLOCK
UNITED STATES MAGISTRATE JUDGE

FILED
FEB 10 1997
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY____/s/___ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD SMITH, Petitioner, v. MR. J. M. RATELLE, et al., Respondents.	Case No.: CV 97-0731-CBM (RNB) ORDER DISMISSING PETITION WITH LEAVE TO AMEND

On February 4, 1997, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody herein. The Court's review of the Petition reveals that it merely is a photocopy of the Petition filed by petitioner on March 7, 1996, which was dismissed without prejudice on account of petitioner's failure to exhaust his state remedies. The Petition filed on February 4, 1997 was not a signed original, and should not have been accepted for filing. Moreover, the Court notes that, although petitioner appended a copy of the California

Supreme Court's September 25, 1996 Order denying his state habeas petition, petitioner failed to provide the information relating to that habeas petition requested in ¶ 7 of the Petition and failed to provide the Court with a copy of that habeas petition.

The Petition therefore is dismissed with leave to amend. Concurrently with the service copy of this Order, the clerk is directed to send petitioner a blank Central District habeas form, which petitioner is ORDERED to complete, date and sign and submit for filing within 30 days of the date of this Order. Petitioner's resubmission should bear the case number assigned to this matter (i.e., CV 97-0731-CBM (RNB)), and be clearly labeled First Amended Petition. In addition, petitioner should be sure to attach as an exhibit to the First Amended Petition a copy of his California Supreme Court habeas petition.

DATED: 2/10/97

/s/
ROBERT N. BLOCK
UNITED STATES MAGISTRATE JUDGE

FILED
CLERK U.S DISTRICT COURT
JUN 11 1996
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD SMITH, Petitioner, v. SANTA MONICA SUPERIOR COURT, et al., Respondents.	Case No.: CV 96-1641-R (RNB) **J U D G M E N T**

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the petition is denied and dismissed without prejudice.

DATED: June 10, 1996

/s/
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

FILED
CLERK U.S DISTRICT COURT
JUN 11, 1996
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD SMITH, Petitioner, v. SANTA MONICA SUPERIOR COURT, et al., Respondents.	Case No.: CV 96-1641-R (RNB) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the records and files herein, and the recommendation of the United States Magistrate Judge. No objections to the Magistrate Judge's Report and Recommendation have been filed herein. The Court concurs with and adopts the findings of the Magistrate Judge.

IT IS ORDERED that Judgment be entered denying and dismissing the petition without prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order and the Judgment herein by United States mail on petitioner and counsel for respondents.

DATED: June 10, 1996

/s/
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

FILED
CLERK U.S DISTRICT COURT
MAY 15 1996
CENTRAL DISTRICT OF CALIFORNIA
BY___/s/___ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES EDWARD SMITH, Petitioner, v. SANTA MONICA SUPERIOR COURT, et al., Respondents.	Case No.: CV 96-1641-R (RNB) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Manuel L. Real, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court of the Central District of California.

PROCEEDINGS

Petitioner filed his Petition for Writ of Habeas Corpus by a Person in State Custody on March 7, 1996. Now pending before the Court is respondents' Motion to Dismiss Petition for Writ of Habeas Corpus (hereinafter "Motion"), filed on

April 11, 1996. Respondents contend that the Petition should be denied and dismissed on account of petitioner's failure to exhaust state remedies as to all of his claims.[1/] Petitioner has not filed formal opposition to the motion. However, on April 24, 1996, petitioner did file certain exhibits which petitioner contends "may be relevant to the Court's determination of the motion of respondent."

The matter is now ready for decision.

PROCEDURAL BACKGROUND

On March 17, 1992, petitioner was convicted after a Los Angeles County jury trial of one count of burglary of the first degree, in violation of California Penal Code ("CPC") § 459. Petitioner admitted three prior serious felony convictions with the meaning of CPC § 667, and three prior prison terms within the meaning of CPC § 667.5(b). On March 31, 1992, the trial

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1. Respondents also contend that certain of petitioner's claims are unintelligible, and that the petition does not state federal claims.

court sentenced petitioner to state prison for a total term of 22 years. (See Exh. A to Motion.)

Petitioner thereafter filed an appeal with the California Court of Appeal. On July 27, 1994, the California Court of Appeal affirmed the judgment, with a modification as to the number of days of presentence credit. (See Exh. B to Motion.)

Petitioner thereafter filed a petition for review in the California Supreme Court. On November 2, 1994, the California Supreme Court denied the petition for review without citation of authority. (See Exh. C to Motion.)

DISCUSSION

The Court agrees with respondents that petitioner's habeas petition should be dismissed.

A federal court will not grant a state prisoner's petition for writ of habeas corpus unless it appears that the prisoner has exhausted available state remedies. 28 U.S.C. § 2254(b) and (c). See also Rose v. Lundy, 455 U.S. 509, 522, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982); Carothers v. Rhay, 594 F.2d

225, 228 (9th Cir. 1979). "For reasons of federalism, 28 U.S.C. § 2254 requires federal courts to give the state an initial opportunity to correct alleged violations of its prisoners' federal rights." Kellotat v. Cupp, 719 F.2d 1027, 1029 (9th Cir. 1983).

Exhaustion requires that the prisoner's contentions be fairly presented to the state courts, and be disposed of on the merits by the highest court of the state. Carothers, supra, 594 F.2d at 228. A claim has not been fairly presented unless the prisoner has described in the state court proceedings both the operative facts and the federal legal theory on which his claim is based. See Picard v. Connor, 404 U.S. 270, 275-78, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971); Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986).

Petitioner has the burden of demonstrating that he has exhausted available state remedies. See, e.g., Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982). Here, petitioner has failed to carry this burden.

In his petition for review to the California Supreme Court, petitioner claimed that the evidence of his prior admission to a 1989 burglary should have been excluded under California Evidence Code §§ 352 and 1101(a), and under the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner also claimed that the trial court erroneously failed to give CALJIC No. 2.17.1 to the jury sua sponte. (See Exh. C to Motion.)

Petitioner's federal habeas petition alleges seven separate grounds for relief:

1. An error in the verdict form, which petitioner seems to be contending adversely impacted his sentence.

2. Ineffective assistance of counsel.

3. Double jeopardy.

4. Juror misconduct.

5. The failure to exclude the evidence of petitioner's admission to the 1989 burglary.

6. Sentencing error.

7. The trial court's failure to give CALJIC No. 2.71.7 sua sponte.

Thus, of the claims now being alleged by petitioner, only Claims 5 and 7 correspond to the two claims raised by petitioner in his petition for review to the California Supreme Court.[2/] Claims 1, 2, 3, 4, and 6 plainly have not been exhausted.

Petitioner may still be able to present his unexhausted claims to the California Supreme Court, by bringing a new state habeas petition and pleading the claims with sufficient particularity. See, e.g., In re Stankewitz, 40 Cal. 3d 391, 397-98, 708 P.2d 1260, 220 Cal. Rptr. 382 (1986) (juror misconduct claim); In re Mendes, 23 Cal. 3d 847, 850, 592 P.2d 318, 153 Cal. Rptr. 831 (1979) (double jeopardy claim); People v. Pope, 23 Cal. 3d 412, 428, 152 Cal. Rptr. 732, 590 P.2d 859 (1979) (ineffective assistance of counsel claim); Application of Ferguson, 233 Cal. App. 2d 79, 81-82, 43 Cal. Rptr. 325 (1965)

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2. The Court expressly does not reach the issue of whether Claim 7, or any of the other claims challenged by respondents, states a cognizable federal claim.

(sentencing error claim). See also In re Harris, 5 Cal. 4th 813, 825, 21 Cal. Rptr. 2d 373, 378, 855 P.2d 391 (1993) ("Habeas Corpus has become a proper remedy in this state to collaterally attack a judgment of conviction which has been obtained in violation of fundamental constitutional rights."); People v. Sorensen, 111 Cal. App. 2d 404, 405, 244 P.2d 734 (1952) (claims that fundamental constitutional rights have been violated may be raised by state habeas petition).

Moreover, even though it appears to the Court that two of petitioner's claims were exhausted, "a district court must dismiss habeas corpus petitions containing both exhausted and unexhausted claims." Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988) (citing Rose v. Lundy, supra, 455 U.S. at 522).

Thus, following dismissal, petitioner will have the option of either: (1) resubmitting his habeas petition with only his exhausted claims **(which would risk forfeiture of his unexhausted claims under Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts)**; or

(2) exhausting his state remedies with respect to the unexhausted claims and then filing a new petition that contains all of the claims raised in the present petition.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition without prejudice.

DATED: May 15, 1996

/s/
ROBERT N. BLOCK
UNITED STATES MAGISTRATE JUDGE